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CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

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KENTUCKY LEADERSHIP INSTITUTE

Leadership is a behavior, not a position

CASE LAW UPDATES SECOND QUARTER

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KENTUCKY

PENAL CODE – KRS 506 - INCHOATE

Perry v. Com., 2015 WL 2446589 (Ky. App. 2015)

FACTS: On December 11, 2011, Meador burglarized the Stovall home in Allen County. Meador was involved with Perry, the Stovall's niece, and he also had a drug problem. On the night in question, the couple (along with Perry's children) had driven around trying to borrow money from Perry's relatives. Unsuccessful, Meador had driven to the Stovall home, where he allegedly told Perry he would "be right back." Perry waited about ten minutes. She "knew something was wrong when the back porch light failed to illuminate." She drove a short distance down the road, positioning the vehicle so that it faced the Stovall home, with the headlights off. Neighbors, suspicious, approached the car, and Perry drove off. Two neighbors followed and they heard the Stovalls' dogs barking. "Perry drove back to the Stovall residence just as Meador was coming down the driveway."

Meador took over driving and sped away, with no headlights. He ran several stop signs. One of the neighbors, David, saw several people, including children, in the car and they relayed information to law enforcement. Deputies Tabbert and Drummond (Allen County SD) arrived, right after the vehicle turned into a driveway and parked beside a trailer. Perry answered their knock and admitted having been in the area. She "claimed she was looking for a friend named Stovall, got lost, and decided to return home."

About 8 p.m., the Stovalls came home, finding the house open and unlocked. Upon looking around, they saw that items had been left on the kitchen counter and that pain medication was missing. Upon further inspection, they found a number of other items missing; Deputy Tabbert arrived in response to their call. Deputy Tabbert noted that there was no "stuff" tossed around and that "certain items had been taken from specific places without disturbing any of the surrounding items." Some of the items taken had been in "less-than-conspicuous places, such as a cookie container in the back of the Stovalls' bedroom closet and a shadow box." This, the deputy found to be "unusual and inconsistent with a typical burglary scene." Barbara Stovall stated that she thought Perry was likely involved, as she'd lived in the house with them for some time.

The deputies decided to pay another visit to Perry. When they arrived, Meador fled. Perry answered the door and was asked for consent to search for the missing items. She agreed to their entry and they spotted "a large pile of coins and pocket knives on the coffee table, and found jewelry hidden inside a child's backpack." Perry admitted to stealing the items. They also saw a pocket watch, which Perry claimed to have bought as a gift but couldn't describe the inscription inside. (Sam Stovall was able to recite the inscription correctly, however.) Stovall also advised that a pistol had been stolen, it wasn't located in the house and Perry claimed Meader had it. The pistol was found subsequently in Perry's back yard. At one point, Perry picked up jewelry that had previously been seized and hid it in her clothing – it was found when she was arrested and searched.

Perry was taken to the station and again interviewed. She admitted involvement but "steadfastly insisted" that Meador drove her to the house, that she did not know he was going to burglarize and that Meador went inside alone. Perry was indicted for Burglary and related offenses. She was convicted of Complicity to Burglary and Tampering with Physical evidence, and appealed.

ISSUE: Will the defendant having an intent that a crime be committed be the correct mental state to support a complicity charge?

HOLDING: Yes

DISCUSSION: Perry claimed that she'd been entitled to an instruction on facilitation, a lesser included offense. The primary difference between that and complicity is the actor's state of mind.[1] "The crimes have different touchstones: for complicity, it is that the defendant intended that a crime be committed; for facilitation, knowledge that a crime is to be committed is sufficient.[2] Because "facilitation and complicity require different mental states, an instruction on facilitation is necessary only if the evidence supports the existence of both mental states."[3]

The Court noted that the prosecution presented Perry as a "knowledgeable, deliberate participant in the crime, acting in concert with Meador, and with the full intent that the burglary be committed" – while the defense portrayed her as an "innocent bystander caught up in a situation not of her making." The Court did not find sufficient "affirmative evidence of [Perry's] mental state" sufficient to justify a facilitation instruction.

In addition, at trial, Barbara Stovall was asked to identify several items in a bag, and identified only a broken watch as their property – indicating she didn't own the remainder of the items. Perry argued that improperly suggested that the other items were stolen from other people, but the court disagreed.

Perry's conviction was affirmed.

PENAL CODE – KRS 511 - CRIMINAL TRESPASS / BURGLARY

Shelton v. Com., 2015 WL 3533244 (Ky. App. 2015)

FACTS: On March 19, 2012, Sgt. Morris (Monticello PD) and Trooper Baker (KSP) responded to a call that two men were in a vacant building, an old automobile garage repair shop. They found Tracy and Chris Shelton, brothers, inside; Tracy was on the ladder holding a tool and Chris at the foot of the latter. Both were arrested.

Tracy was indicted for Burglary 3nd, and also for PFO.

Tracy Shelton was convicted and appealed.

ISSUE: Does an intent to steal justify a burglary charge?

HOLDING: Yes

DISCUSSION: Tracy argued he was entitled to an instruction on Criminal Trespass 2nd. The Court looked to the two charges (Burglary and Criminal Trespass), along with the facts. Specifically, Det. Baker testified that Tracy admitted they were inside with the intent to steal copper. Nothing else was introduced to explain why he'd been inside with "wire cutters and a ladder." The Court agreed that a denial of an instruction on the lesser offense was proper.

Shelton also argued that the prosecution (and his own attorney) "mentioned his prior convictions and charges on several different occasions." For instance, the prosecutor named a Probation & Parole Officer on their witness list, and Det. Baker mentioned, as well, that the brothers had other warrants and were being processed for other offenses when taken to jail. He also explained certain delays as being because other citations had to be written. However, he did not object to the statements at the time and as such, even though the statements were arguably improper, the Court concluded his failure waived his rights in the matter.

Shelton's conviction was upheld.

[1] Bratcher v. Com., 406 S.W.3d 865 (Ky. App. 2012).
[2] See Young v. Com., 50 S.W.3d 148 (Ky. 2001).
[3] Dixon v. Com., 263 S.W.3d 583 (Ky. 2008).

PENAL CODE – KRS 514 - THEFT

Wilson v. Com., 2015 WL 2266471 (Ky. 2015)

FACTS: On the day in question, a Macy's loss prevention officer spotted Wilson putting items into a trash bag and leaving the store. When stopped, he was also found to be wearing a jacket from the store, still with a tag and security device. He had no receipts and surrendered the items. The total retail value of all of the items was $527.96. Although he confessed at the time, Wilson argued at trial that he'd stolen the jacket in an earlier theft and since it was not "stolen concurrently," its value could not be consolidated – which would bring the matter under the level to be a felony. The jury, however disagreed, and he was convicted.

Wilson appealed.

ISSUE: May items found together following a theft be presumed to have been stolen at the same time?

HOLDING: Yes

DISCUSSION: The Court noted that "paramount among the evidence presented was the fact that the jacket still had Macy's price tag and security device attached to it." His possession of the jacket at that time "robustly suggests that he stole it at the same time he took the other items." Further, he handed over the jacket when challenged by the loss prevention officers, and in fact, even confessed to stealing it in a written document.

The Court upheld his conviction for felony theft.

Grubbs v. Com., 2015 WL 3451756 (Ky. App. 2015)

FACTS: On June 19, 2012, Grubbs and three others were visiting Kohl's. Finding their actions suspicious, the Loss Prevention Officer, Stucker, monitored them. The four were putting items in the cart and Grubbs "was observed putting items of clothing down his pants and in his shirt." He also put more items into a clear plastic bag. He and Love abandoned the cart near an exit and left the store. There, they were stopped by two officers and Stucker. Both were arrested. Trice and Majors, the other two involved, were captured at a nearby restaurant, where additional merchandise was found in the restroom.

Using the price tags, Stucker listed the merchandise found on Grubbs at $687. The total value of all the merchandise recovered was $1,594.50. She did not know the wholesale cost or whether any items were on sale. Grubbs was convicted of Theft over $500 and appealed.

ISSUE: Is the retail price the assumed value of a stolen item?

HOLDING: Yes

DISCUSSION: In determining whether the valuation was correct, the Court looked to Irvin v. Com.[4] The Court noted that ""[t]he retail price at which an item is offered for sale by a merchant in the ordinary course of business represents an expert's opinion of what it will bring from a willing buyer at that time and place, and a jury is free to accept it as correct." In that case, the jury was instructed on both variants of theft (misdemeanor and felony) and allowed to decide. The Court agreed and upheld his conviction.

Barth v. Com., 2015 WL 3643449 (Ky. App. 2015)

FACTS: On February 7, 2012, Brenner reported that a truck was missing from the car lot where he worked in Bardstown. He later testified the truck was valued at $12,800, and that although the vehicle

[4] 446 S.W.2d 570 (Ky. 1969).

was a 1989 model, it had been heavily modified and included a new engine, transmission and interior. The truck was described as the type "a person would display at an automobile show." Maraman testified that, that morning, Barth arrived driving the truck and that they made a number of changes to the vehicle, including replacing the license plate. Later that same day, Deputy Fowler, Bullitt County SD, stopped Barth for a traffic offense. He was arrested on other charges and the truck impounded – it was later determined by the VIN that it was the truck stolen from the car lot.

Barth was convicted for Receiving Stolen Property over $10K and PFO. He appealed.

ISSUE: Is the value of the item at the time it was stolen the value for theft purposes?

HOLDING: Yes

DISCUSSION: Barth argued that because the changes had been made, the vehicle was worth less than $10K – and that he'd been entitled to instructions to that extent. He also contended the jury should have been instructed on unauthorized use. He further argued that testimony as to the value of the vehicle was "only an estimate" and that a jury could have valued it at much less. Although an instruction that indicated a lesser value was allowed, it was up to the trial judge to decide when appropriate. Further, the Court noted ""[t]he value of the property on the date the offender receives the property is the proper date for determining the severity of the violation."[5] In addition, "It is well established that the "the testimony of the owner of stolen property is competent evidence as to the value of the property."[6] The evidence indicated that Barth was in possession of the vehicle before it was modified in a way that dramatically reduced its value. In addition, "After coming into possession of the truck, Barth immediately stripped it of outwardly identifying equipment, painted it, and replaced the license plate. His actions following taking possession of the truck are consistent with knowledge that the pickup truck was stolen and an intent to deprive the owner of future possession.''

The Court upheld his conviction.

PENAL CODE – KRS 520 – FLEEING AND EVADING

Cordle v. Com., 2015 WL 3643428 (Ky. App. 2015)

FACTS: On May 22, 2012, Cordle and Adams visited a friend, Lemaster, in Greenup County. Cordle was drunk and he and Lemaster got into a fight. Lemaster told Cordle to leave, and Cordle knocked him to the ground, kicked him, and also threw a cup of coffee on him. Cordle left, taking Lemaster's truck keys with him. As the police arrived, the saw the SUV being driven away. Sgt. Smith activated his lights and yelled for the driver to stop, but the driver (Cordle) drove through the yard and into an alley. Sgt. Smith entered the vehicle into NCIC and put out a BOLO.

A few hours later, Sgt. Goodall (Lawrence County SO, Ohio) received a complaint about a man going door to door, "looking for gasoline." He recognized the connection to the Kentucky BOLO and ultimately arrested Cordle.

Cordle was ultimately convicted of Fleeing and Eevading, 1st, Unauthorized Use of a motor vehicle, Assault 4th and PFO. He appealed.

ISSUE Must a person be impaired to the DUI level for a Fleeing and Evading charge?

HOLDING: No

DISCUSSION: Cordle was charged with Fleeing and Evading 1st, because he was under the influence at the time. However, Cordle argued that there was no evidence presented that he was impaired by alcohol

[5] Tussey v. Com., 589 S.W.2d 215 (Ky. 1979).
[6] Com. v. Reed, 57 S.W.3d 269 (Ky. 2001).

with respect to driving when he fled. The court, however, noted that "First-degree fleeing or evading only requires proof the defendant was driving under the influence of alcohol, not proof of driving impairment." See KRS 520.095 and KRS 189A.010." and not the higher standard for a DUI. In fact, he received an intoxication instruction (admitting that he was intoxicated) at his own request.

Cordle's conviction was sustained, but part of the sentencing was reversed for procedural reasons.

FAMILY / DVO

Steele v. Steele, 2015 WL 1638420 (Ky. App. 2015)

FACTS: On May 22, 2014, following a courthouse proceeding related to their divorce, Amber Steele alleged her husband, Jarrod, confronted her and her attorney in the parking lot and trapped her in the car. CSOs went out to intervene and Steele went to his own vehicle, with Amber returning to the courthouse. However, the CSOs reported that Jarrod positioned himself behind a nearby building. He left Amber voicemail and texts and stalked her, showing up at places where she was located. She obtained a DVO and Jarrod appealed.

ISSUE: Is an allegation of a threat of physical violence sufficient for a DVO?

HOLDING: Yes

DISCUSSION: Jarrod argued that the trial court did not use the correct definition of domestic violence and that it only focused on Amber's fear of him, not on specific actions. Although he "did not directly voice threats of injury," they were implied by his messages and conduct." (The Court also noted the constant presence of a weapon, since Jarrod was a police officer.)

The Court agreed that although physical harm is not necessary to meet the statute, that the "infliction of fear of imminent physical injury" is necessary. Amber never claimed she believed that Jarrod would harm her, but only that he was unpredictable.

The Court vacated the DVO.

McIntosh v. Campbell, 2015 WL 3826246 (Ky. App. 2015)

FACTS: Campbell alleged that she and McIntosh had a romantic relationship in the first half of 2014 and that she moved into his home in May of that month. She stayed at that home almost exclusively for two months and kept clothing and belongings there. She helped with a few bills at the home and they shared a cell phone plan. On July 8, 2014, following escalating violence, she claimed that McIntosh attacked her and injured her. (Photos were shown of the injuries.)

McIntosh, however, "vehemently denied that [Campbell] ever lived with him" and also denied any assault. Other witnesses supported Campbell's testimony. The officer who arrived in response to the 911 call that day testified that Campbell "became belligerent when he requested her to leave" the property and that he subsequently arrested her.

The Court agreed they were cohabitating and awarded Campbell a DVO. McIntosh appealed.

ISSUE: Is "living together" dependent upon facts?

HOLDING: Yes

DISCUSSION: The Court looked to the criteria set forth in Barnett v. Wiley for cohabitation.[7] The Court acknowledged that with the "lifestyles of modern-day couples," cohabitation is not a cut and dried

[7] 103 S.W.3d 17 (Ky. 2003).

situation. However, the Court noted, even though they were not in a longstanding relationship, nor that a "great deal of thought or planning [went] into their living arrangements," that they did, however appear to be living together. Witnesses testified that they believed they were in fact living together.

The Court upheld the DVO.

Campbell v. Campbell, 2015 WL 2445049 (Ky. App. 2015)

FACTS: Following several earlier petitions that were retracted before going to a hearing, Jason Campbell was the respondent in allegations by his divorced spouse, Amber, that he had engaged in domestic assault in Pike County. Without admitting to specific acts alleged, Jason admitted to a "history of domestic conflict, including his own violent acts." However, he argued that he did not commit the alleged assaults and that in fact, the couple was attempting to reconcile and was on good terms.

Amber and her son (Jason's step-son) were involved in an altercation and that she stated she was afraid Jason was going to assault her. The other children, including Jason's daughter with Amber, testified that they too were afraid Jason was going to hurt them. He returned later that night but left when told to do so by the police, and the officers testified that Amber was crying, agitated and anxious.

The Court awarded a DVO against Jason and he appealed.

ISSUE: Is past history a factor in a DVO?

HOLDING: Yes

DISCUSSION: The Court noted that the "parties' relationship was tainted by violence, anger, and volatility." Amber "portrayed recent acts of legally unacceptable violence perpetrated by Jason" and those "past acts of intimidation and aggression caused Amber to fear for her life on the evening of September 5, 2014." "Amber perceived Jason as physically threatening."

The Court found sufficient evidence to support the DVO.

Renick v. Baalke, 57 S.W.2d 663 (Ky. App. 2015)

FACTS: In 2007, after a dating relationship, Renick and Baalke had a child together. They ended their relationship in 2009 and engaged in a joint custody arrangement. Between that time and 2014, when Baalke requested a DVO in Warren County, they had a contentious relationship. At the hearing, she testified as to the "repeated escalation" of conduct by Renick (and his family) that made her "absolutely terrified for her life" and her fear that he would kill her.

She also testified to his appearance at a location where she and their child was seeing a movie, and engaged in stalking and threatening behavior, including threats via social media. The Court entered to DVO and Renick appealed.

ISSUE: Will repeated threats justify a DVO?

HOLDING: Yes

DISCUSSION: The Court looked to the definition of domestic violence and abuse in KRS 403.720(1) and noted that the "case at bar presents past instances that extend far beyond threats and tread into the realm of anger and terror." The Court agreed that his "continued threats and inappropriate comments on Facebook, followed by conduct that verified such statements" indicated he continued to be a threat.

The Court upheld the DVO.

JUVENILE

Q.M, A Child Under Eighteen v. Com., 459 S.W.3d 360 (Ky. 2015)

FACTS: On April 13, 2011, Jon[8], age 15 "pulled his penis out of his pants, put it on the shoulder of the student in front of him, and tried to stick it in the student's ear and hit him in the face with it." A juvenile complaint was filed, which was changed to a Sexual Abuse 3rd. At the same time, he also had a pending domestic violence assault charge, as well. The judge ordered that the case be "informally adjusted" on the condition that he move to his father's home in Oklahoma. He did so, but returned to Kentucky five months later and moved back in with his mother.

The Commonwealth, learning Jon had returned, redocketed the case and asked that the sex offense charge be reinstated. Jon was effectively without counsel, as the DPA attorney standing in for a previously appointed attorney was "conflicted out" due to her legal connections to the witness against Jon. Jon was released on strict conditions. With confusion as to who would represent Jon, he returned to court for what was supposed to be a pretrial conference, but which turned into an adjudication hearing in which he admitted to the sex abuse charge. (The still pending, almost 2 year old, assault charge was dismissed.) He was not told "that as a juvenile sexual offender, Jon could remain in sexual-offender treatment for up to four years, well past his eighteenth birthday, pursuant to KRS 635.515." Finally, in May, 2012, he was sentenced to a DJJ facility, "despite the fact he had been in the community for nearly a year without any further offenses—rather than ordering treatment in the community."

Ultimately, with new counsel, Jon sought discretionary review from the Kentucky Court of Appeals.

ISSUE: Must proper notice be given in a juvenile case that an information adjustment is now a formal process?

HOLDING: Yes

DISCUSISON: The Court began by addressing the differences between juvenile and adult proceedings, and specifically that juvenile actions are "in the interest of the juvenile," rather than against the juvenile. KRS 600.010(2)(a) expresses the legislative purposes underpinning the juvenile code – and which requires that "efforts are to be made to protect children; to strengthen and encourage family life; to maintain the biological family unit; and to conduct data collection and research to support ongoing juvenile practices." Recent amendments (pursuant to the 2014 General Assembly) emphasize "a preference for in-home interventions, and avoiding out-of-home placements "to the extent possible." The Court examined the process of adjudication and disposition, as well as "informal adjustment." The Court noted that the prior two are much more formal, and that certain criminal rules will apply. Informal adjustment "removes the procedural rights and safeguards that accompany formal court proceedings." That requires, however, that the parties agree, and while a victim can be consulted, they do not have to consent. Although the court is given more leeway, that does not give the court unfettered discretion, however. Because the child is waiving certain rights, it is critical that the juvenile agree to the process.

The Court agreed that an informal adjustment can be converted to a formal proceeding, given proper notice to all parties. Most importantly, "nothing in the record establishes that the child and his mother wanted him to leave Kentucky and go to live with his father among strangers in another state." In effect, the Court banished the child from Kentucky, and no indication as to how this was in the child's best interest. And worse, there were no time frames or other conditions, and in effect, the trial court "entered a change of custody order without a hearing on the propriety of the father as a custodian." That was outside the court's jurisdiction. When the child returned, the county attorney's attempted to "revoke" the informal adjustment as if it was an actual adjudication probation. The Court found the attempt to convert the process to one more formal was improper. The Court equated the process to a "bait and switch," where the " child's non-offense conduct during the informal: adjustment is used against him." It was appropriate for him to agree to live with the other parent, but the "court could not enforce such an

[8] A pseudonym.

agreement without the consent of the child's legal custodian." Certainly, he was given no information as the consequences of a voluntary admission of the sex offense. The court noted that his inappropriate behavior was "at least as indicative of immature, adolescent horseplay as it is of sexual perversion.

The Court noted that "Once a case has been determined to be appropriate for an informal adjustment, the case cannot be "returned" to formal proceedings." Unfortunately, the court noted, that it was "wholly unknown" what effect this improper incarceration had on Q.M., but that "research that sparked juvenile justice reforms nationwide has indicated a negative effect from placing low-level offenders with more serious offenders."

The Court reversed the lower court's decision and ordered that if Q.M. was in custody, he was to be immediately released.

Murphy v. Com., 2015 WL 1880690 (Ky. App. 2015)

FACTS: In 2009, Murphy was adjudicated in Michigan as a juvenile for a sexual assault on a younger child – the conduct would equate roughly to Rape 2nd in Kentucky. In 2011 he moved to Kentucky and registered under the Sex Offender Registry Act (SORA). He updated his address several times and then became homeless. He was located and told to register but did not do so, and two days later, he was arrested for violating SORA. He moved to dismiss, arguing that in Kentucky, juvenile adjudications do not require registration. That was denied, so he took a conditional guilty plea and appealed.

ISSUE: Is an out of state juvenile offense subject to SORA?

HOLDING: Yes

DISCUSSION: Murphy argued that although those adjudicated as juveniles were required to registered under KRS 17.510(7), that convictions with KRS 635.040, which "states that no civil disability may be based on a juvenile adjudication." The Court, however, noted that since the Kentucky juvenile statute was specific to Kentucky, that it was still proper to require him to register for an offense he committed in Michigan. As such, the court agreed, KRS 635.040 "only applies to juvenile cases adjudicated before a District Court in Kentucky."

The Court upheld Murphy's plea

NON-PENAL CODE – TRAFFIC – LEAVING THE SCENE

Gill v. Com., 465 S.W.3d 35 (Ky. App. 2015)

FACTS: On June 7, 2013, Gill and his girlfriend, Kane got into an argument at his residence in Butler County. Their five year old daughter was also present. Gill left with the child, to "diffuse[sic] the situation." Kane followed and then intentionally struck Gill's vehicle as he was crossing a bridge – and she later admitted this. He struck the wall of the bridge. Gill continued on, followed by Kane, to a nearby business. She followed him there and "began yelling at him." Gill left and returned home; Kane stayed there and called the police.

Gill heard the police dispatched on the scanner, so he returned. He was charged with Leaving the Scene and ultimately convicted and fined. The Circuit Court confirmed and he appealed.

ISSUE: Is the subject of an intentional collision required to stay at the scene?

HOLDING: No

DISCUSSION: Gill argued that since he was the victim of an intentional collision, not an accident under the normal meaning of the term, he couldn't be convicted of leaving the scene of an accident. Since it

was undisputed that Kane intentionally struck Gill's vehicle, the Commonwealth could not "prove an essential element of the crime" charged. In a footnote, the Court noted, "it seems unreasonable to force the drivers of Kentucky who are intentionally struck by a vehicle to stop during such an encounter and place themselves in further danger." The Court vacated Gill's conviction.

DRIVING UNDER THE INFLUENCE

Ballinger v. Com., 459 S.W.3d 349 (Ky. 2015)

FACTS: On September 14, 2010, Ballinger was arrested for DUI in Bowling Green. He had previously been convicted of DUI three times prior, but because the look-back period is only five years, two of the convictions did not count for charging purposes. As such, he was charged with DUI 2nd. However, a record check also showed that he'd been charged twice in July, 2010 for DUI, in Barren County. The Warren County Attorney requested a continuance pending the resolution of those two cases. When he pled guilty, ultimately, the Warren County charges were upgraded to DUI 4th offense, a felony. Ballinger argued that the two convictions were not eligible predicates because the convictions were entered later than the Warren County offense. The Circuit Court agreed that only DUI 2nd offense was proper.

The Commonwealth appealed and the Court of Appeals reversed, relying on Royalty v. Com.[9] Under Royalty's "conviction-to-conviction" scheme, which depended upon an earlier case, Com. v. Ball,[10] in which the "only relevant question at the time of a DUI conviction with respect to penalty enhancement was the number of prior convictions within the last five years. Offense dates did not matter—the conviction-to-conviction approach controlled." However, in Fulcher v. Com., it was suggested that that KRS 189A.010(5) provides for penalty enhancement under a conviction-to-offense approach, a timely offense not counting for enhancement purposes unless the conviction for that offense was entered prior to the commission of the current offense."[11]

The Court looked to KRS 189A.010(5), in which certain panels found that the "plain meaning of "all convictions" in subsection (5)(e), is any conviction for which there is adequate record support at the time of the new conviction." Ballinger argued that provision should be understood to be "prior offenses shall include all convictions in this state, and any other state or jurisdiction [prior to the current offense]."

With no clear answer at hand, the Court looked to general principles of statutory construction. The Court agreed that currently, "KRS 189A.010(5) does not, on its face, make perfectly clear what counts as a predicate offense for penalty enhancement purposes." In other words, there is a great deal of ambiguity in the situation. The Court concluded that the correct construction must be that "all duly certified DUI convictions (for offenses committed within five years prior to the current offense) entered against the defendant prior to his conviction in the current case, even if some of those convictions were not yet entered at the time of the current offense." The Court noted that the "statute requires that a predicate DUI offense be prior to the current offense, but it does not require that the predicate conviction be prior to the new offense, and we are not at liberty to make additions to the statute." As such, the Court agreed, Ballinger is subject to a prosecution for DUI 4th offense. The Court noted that it was the "clear intent of the statute that repeat offenders suffer progressively more serious consequences for each separate offense."

The Court upheld the decision to allow Ballinger to be charged with DUI 4th offense, a felony.

[9] 749 S.W.2d 700 (Ky. App. 1988).
[10] 691 S.W.2d 207 (Ky. 1985).
[11] 149 S.W.3d 363 (Ky. 2004).

SEARCH & SEIZURE – SEARCH WARRANT

Byrd / Godsey v. Com., 2015 WL 3826345 (Ky. App. 2015)

FACTS: The Byrds (Randy and Janina) and Godsey (along with 14 others) were involved in a criminal conspiracy – stolen property was being sold at two "Cash-In" stores in Erlanger and Covington, as well as on Ebay. As part of the investigation, Det. Fern (Erlanger PD) obtained a search warrant for the Byrd home in Union, seeking "U.S. currency; ledgers, receipts and other similar business records from 'Cash In'; stolen property associated with Cash In; and, computers, cell phones and/or other electronic devices containing evidence of sales of stolen property." (He had consulted with his counterpart in Covington who had searched the home of other suspects.) During the execution, a number of items not specifically listed on the search warrant were seized "as being stolen property believed to be associated with" the operation. (It was later testified that "the items seized in the Byrd home were consistent with the items taken by Detective Kane from the Covington Cash In location.") Most of the defendants pled guilty but the Byrds and Godsey (and 2 others) went to trial. Both Byrds and Godsey were convicted of Engaging in Organized Crime. They appealed.

ISSUE: May items not particularly listed on a search warrant be seized?

HOLDING: Yes (but see discussion)

DISCUSSION: The Byrds argued that ""Items to be seized under a legally executed search warrant must be described 'particularly' or 'as nearly as may be' under the respective provisions of the Fourth Amendment to the U.S. Constitution and § 10 of the Kentucky Constitution."[12] "However, the degree of specificity required is flexible and will vary depending on the crime involved and the types of items sought. 'Thus a description is valid if it is as specific as the circumstances and the nature of the activity under investigation permit.'"[13] In the case at bar, the trial court noted that the police "were investigating what they believed to be a stolen property scheme involving a large and varied number of items taken from various merchants." The testimony at the hearing indicated the police had learned of a wide array of merchandise that Cash-In was purchasing from thieves, including electronics, power tools, white strips, North Face apparel, Under Armor apparel, batteries, hunting accessories, and gift cards. In light of the scope and nature of the suspected criminal enterprise, we agree with the trial court that the descriptions contained in the warrant were valid."

Further, the Court agreed that the evidence indicated that the defendants were all involved in a single, ongoing criminal enterprise.

The Court upheld the convictions.

Merriman v. Com., 2015 WL 1968507 (Ky App. 2015)

FACTS: On November 26. 2012, a Lexington officer received a tip from a CI that Merriman was selling oxycodone pills from his mother's home. A CI made a buy on December 3. The next day, Officer King obtained a search warrant for the home, stating by affidavit that the CI had made a buy from there within the previous 36 hours. When it was executed (7 hours later), they observed Merriman arrive and open his trunk. Officer King was told by another officer that he "could see that Merriman appeared to be concealing something in his trunk." They approached as Merriman stood by the trunk. 20 Oxycodone and 3 Xanax were found in his pockets, along with over $1500 in cash. In the open trunk, a detective spotted "a piece of rolled-up toilet paper, which contained twenty more Oxycodone pills." Merriman was arrested. He moved for suppression of the evidence found in the trunk, which the trial court found to be "lawful under Arizona v. Gant because it was reasonable to believe that Merriman's vehicle contained evidence of the offense of the arrest."[14] He took a conditional guilty plea and appealed.

[12] Wilson v. Com., 621 S.W.2d 894 (Ky. 1981).
[13] U.S. v. Henson, 848 F.2d 1374 (6th Cir. 1988), quoting U.S. v. Blum, 753 F.2d 999 (11th Cir. 1985).
[14] 556 U.S. 332 (2009),

ISSUE: Is a subject's home a "secure operational base?"

HOLDING: Yes

DISCUSSION: In keeping with the flexible standard accorded to determining probable cause, the Court must look to the "circumstances of each case." To measure staleness, the Court looked to the "inherent nature of the crime." The court must address the "following variables: "the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), the place to be searched (mere criminal forum of convenience or secure operational base?),[15] Merriman argued that the one sale did not indicate that he would continue to sell from that location, and noted that the pills were "perishable and easily transferable." (No drugs were found in the house.) The Court noted that it was a secure operations base because it was his mother's home and contacts were made several times from that address.

With respect to the trunk, the Court noted that ""among the recognized exceptions to the warrant requirement is a search incident to arrest. Under the search incident to arrest exception, an officer is permitted to search the person arrested and the area within the arrestee's immediate control."[16] Under Arizona v. Gant, "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."[17] The Court agreed it was reasonable for the officers to believe that drugs might be found in the trunk.

The Court affirmed Merriman's plea.

SEARCH & SEIZURE – REASONABLE EXPECTATION OF PRIVACY

Hinkston v. Com., 2015 WL 3825990 (Ky App 2015)

FACTS: Hinkston began a contact with a man via an adult online website – they talked on the phone and exchanged photos, but not apparently real identities. Hinkston was invited to the man's home for a potential encounter and was given an address – with the man stating he would pay the cab fare. However, when Hinkston arrived and went to the back of the house, as directed, he found no one there. The cabbie then reported to the cab company that Hinkston had "run out on paying his fare" and the police were called. Deputies Ridgell, Evans and Nelm (Boone County SO) were sent to the house and spoke to Hinkston. Deputy Ridgell "discovered that a number of serious prank calls had been made" from the address.

Upon further investigation, the cab driver stated that Hinkston had a bag with him (a "brown leather brief case-type") when he arrived, but didn't have it when he came back to the cab. (In fact, he'd left it on the back porch against the back wall of the house.) He was evasive when the deputy asked about it. Deputies retrieved the bag and obtained consent to search it. A meth pipe and methamphetamine were located in the bag.

Hinkston was charged with Possession of a Controlled Substance, Paraphernalia and Theft of Services (for the cab fare). He moved for suppression and was denied. Hinkston took a conditional guilty plea and appealed.

ISSUE: Is there an expectation of privacy in the curtilage of a home where you are an anticipated guest, when you don't even know the actual owner?

[15] Ragland v. Com., 191 S.W.3d 569 (Ky. 2006) (quoting U.S. v. Henson, 848 F.2d 1374 (6th Cir. 1988)).
[16] McCloud v. Com., 286 S.W.3d 780, 785 (Ky. 2009) (citations omitted).
[17] 556 U.S. 332 (2009).

HOLDING: No

DISCUSSION: Hinkston argued that he had a reasonable expectation of privacy in the curtilage of the location, "because he believed he was an overnight guest, and that he expected the back deck to be a safe and private place to leave his bag while he spoke with the cab driver." The Court noted that he "had never physically met the purported owner of the home," but had only communicated by phone and email. He did not even know the individual's real name, had never been to the house before and didn't really know who even owned the property.

The Court agreed that "no reasonable person would believe at that point that he was a guest who had a right to privacy in the home and its curtilage." Unlike the situation in U.S. v. Waller, Hinkston had not yet been welcomed at the home and invited inside, even.[18] The Court agreed that "warrantless seizures of personal belongings are permitted under certain circumstances," and in this case, the Court equated it to a Terry situation, and agreed that the deputy had reasonable suspicion that the bag might contain something indicating criminal activity.

Likewise, although the Court acknowledged that he had a reasonable expectation of privacy in the bag, the evidence indicated that he had given consent. The Court noted there was some discrepancy in the testimony but that the deputies both testified that they received consent and that Hinkston was cooperative.

The Court agreed that the denial of the motion to suppress was proper and upheld Hinkston's plea.

SEARCH & SEIZURE – MOTEL

Stephens / Keller v. Com., 2015 WL 3532908 (Ky. App. 2015)

FACTS: In early April, 2013, Trooper Devasher learned that Stephens had been stopped recently for a traffic violation, during which time a large quantity of matchbooks missing strikeplates were observed. (This indicated they'd been removed to be used in a method of methamphetamine manufacturing.) the trooper was aware of Stephens's history, and that he was on parole and limited to travel in Scott County, only. He then learned that Lexington PD was investigating a location where methamphetamine manufacturing was ongoing – by the same method. On April 29, 2013, he spotted Stephens car parked at a motel in Lexington. The room was registered to Kleisteich, who was connected with the Lexington property, but the trooper believed he could hear Stephens' voice, inside. No one answered his knock.

Probation and Parole was summoned, and forced entry. They found Stephens "pouring a smoking liquid into the sink." Keller and her young teenage son were also present. Both Stephens and Keller were arrested for manufacturing methamphetamine (along with Child Endangerment).

Both moved for suppression, which was denied. They took conditional guilty pleas and appealed.

ISSUE: Must an individual establish standing to contest the search of a motel room?

HOLDING: Yes

DISCUSSION: Stephens and Keller argued that their rights were violated by the warrantless entry and search of the motel room. However, the Court noted that "neither Stephens nor Keller established standing to challenge the search of the motel room." Although there was no evidence as to how they came to be in the room, or "what possessory interest or status they held in the room," they were "merely present" in that room.[19]

[18] 426 F.3d 838 (6th Cir. 2005).
[19] See Minnesota v. Carter, 525 U.S. 83 (1998).

The Court upheld the denial of the suppression motion, and their pleas.

SEARCH & SEIZURE - TERRY

Banks v. Com., 2015 WL 3533197 (Ky. App. 2015)

FACTS: Officers Doane and Pope (Lexington PD) were dispatched to a disturbance. Upon arrival, they found two people boxing in the middle of the street, but were not sure if it was for sport or was a fight. When they got out (in uniform, although in an unmarked car), most of the crowd broke up and walked away, with the majority heading to a particular house. Three men, including Banks, however, headed in the opposite direction. Officer Doane thought he saw Banks "shift to the right when he walked past," and he had a red bandana at his waistband and a bulge in the pocket. The officer approached Banks and asked to talk. Banks stopped but asked why he was being detained, he then told the officer "he wanted to leave." Instead, Doane told him to place his hands behind his back, which led to Banks being wrestled to the ground and handcuffed.

When frisked, it was discovered that the bandana was tied to the barrel of a handgun, and he also had a holster and extra magazine. He was charged with CCDW, and when it was learned he was a convicted felon, he was further charged. In addition, the gun had been reported stolen. Banks was charged and moved to suppress the evidence. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is walking away from a group gathering enough to justify a Terry stop?

HOLDING: No

DISCUSSION: Banks argued that the weapon and ammunition should have been suppressed as the product of an improper search. The Court noted that the consequence for violating the Fourth Amendment, by conducting an unreasonable search, was the loss of the evidence.[20] The stop and the search were conducted pursuant to Terry, which is intended to balance "two competing interests; personal liberty versus society protection."[21]

The Court looked to the three facts provided by Officer Doane in justifying the stop: the direction Banks walked, his "shift to the right," and the bandana and bulge at the waistband. The Court noted that Terry "is triggered when an officer observes **unusual conduct."** The Court noted that it "is not unusual for a gathering of people to depart to various places." Despite the officer finding it suspicious, the Court noted the "the group *dispersed*; there was no longer a group from which to separate." The Court was "not persuaded that peacefully walking away from a gathering is unusual conduct – or at least conduct so noteworthy as to justify a stop and search." Further, in Com. v. Sanders, the Court had held that "merely walking down a street is not 'unusual conduct' that can be used to warrant a Terry stop."[22]

With respect to the bandana and the bulge, Officer Doane noted the connection of a red bandana to gang activity. Since he had observed no criminal activity, at that point, he simply found Banks's behavior to be suspicious, which the Court found was not enough to trigger the stop, and the frisk. The Court could find no precedent "where an unidentified object aroused reasonable suspicion without the presence of other factors." In Washington v. Com., however, the individual "changed directions when he observed the police officers; and he was also dressed in gang colors" – and the Court held that was insufficient for a stop.[23] With this situation providing even less, the Court could not conclude that the totality of the circumstances justified the stop and the search.

The Court reversed the denial of the motion to suppress.

[20] Wilson v. Com., 37 S.W.3d 745 (Ky. 2001); Mapp v. Ohio, 367 U.S. 643 (1961).
[21] Terry v. Ohio, 392 U.S. 1 (1968)
[22] 332 S.W.3d 739 (Ky. App. 2011).
[23] 2007 WL 3406759 (Ky. App. 2007).

Stevenson v. Com., 2015 WL 3825986 (Ky. App. 2015)

FACTS: Lexington PD received a fraud report from a local Speedway, in which the clerk stated a man had come in with two forged checks. A vehicle was identified as a Georgia rental that was long overdue. Officers were told to be on the lookout for the vehicle. That evening, Sgt. Perrine and his partner spotted the vehicle at a local hotel and began observing it. At about 7:47, Stevenson and another man came out and left, followed by the officers. Sgt. Perrine made the stop based upon the fact the vehicle had been parked in a handicapped space at the hotel without a permit and because it was the subject of the investigation. They attempted a traffic stop, but Stevenson did not stop immediately. The officers separated the occupants and both were frisked. Stevenson was locked in the cruiser, but not handcuffed. Both were found to have criminal drug histories. A drug dog was summoned.

Det. Haynes, who was heading the investigation, arrived. He gave Stevenson his Miranda warnings and told him about the Speedway situation. Stevenson made incriminating statements, admitting he had forged the checks. At the same time, the dog alerted to drugs and search ensued. Stolen checks were found. Stevenson was taken to the station to be interviewed and made "further incriminating statements." He was charged, and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May subjects be detained on reasonable suspicion to await a drug dog?

HOLDING: Yes

DISCUSSION: Stevenson argued that he was held for an unreasonably long time and that the stop itself was improper. The Court agreed that investigative detentions "must be temporary and last no longer than is necessary to effectuate the purpose of the stop." It took approximately 20 minutes from the time the stop was initiated until the K-9 arrived. However, the Court agreed the police had "reasonable suspicion to justify" summoning the drug dog and extending the stop. (Sgt. Perrine testified that those involved in financial crimes are often "feeding a drug habit.")

The Court upheld the stop and the detention.

SEARCH & SEIZURE – SWEEP

Collins v. Com., Pace v. Com., 2015 WL 3826024 (Ky. App. 2015)

FACTS: In April, 2013, a homicide occurred in Lexington. With tips suggesting there would be retaliation for that murder, officers were on alert in that area. On April 18, 2013, officers observed activity that suggested that two groups were preparing to engage in violent activity; the officers there went to investigate. One person they stopped, and who was clearly under the influence, indicated he'd just smoked marijuana in a particular building. Localizing their suspicion to Apartment 14, they knocked and got no answer. They stepped onto an exterior patio where they could see into the open sliding glass door and Officer Shepherd saw bagged and tied green substance. Lexington officers did a protective sweep and subsequent search of the apartment shared by Collins and Pace. They found bagged marijuana, a grow operation and cocaine, but seized nothing. Collins, contacted at work, arrived, with Pace following, and both consented to a search. Both men were arrested.

Both argued for suppression, which were denied. Both took conditional guilty pleas and appealed.

ISSUE: Is an entry due to the possible need for emergency aid a "sweep?"

HOLDING: No

DISCUSSION: The Court first considered the protective sweep. The Court looked at the two categories of a sweep, the first being one done incident to an arrest, and which could be done without any cause at all – in effect, an extension of the search incident to arrest doctrine. The second category of sweep is a

"more pervasive search, 'extending beyond the area immediately adjoining the place of arrest,; but which requires 'articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger.'"[24]

The Court also acknowledged the "emergency aid" exception, with allows officers to assist those in need of immediate help.[25] To compare, a sweep is for the safety of the officer, while the emergency aid is for an occupant. In fact, the Court, after looking at the facts and the testimony of the officers, stated, the entry was not a sweep but was done because Officer Shepherd "cited her concern" that an occupant inside might be injured.

The court upheld the pleas.

SEARCH & SEIZURE – KNOCK & TALK

Smith v. Com., 2015 WL 1636856 (Ky. App. 2015)

FACTS: In October, 2012, while on targeted foot patrol, Officer Gordon (Lexington PD) observed a drug deal at Smith's home. A white female parked the vehicle at Smith's house and knocked on the door. No one answered, but after a quick phone call, she was admitted. She remained a few minutes (although the exact time was in dispute). When the female spotted the officers when leaving "she looked nervous and quickly drove away."

Officers Gordon and Norris, "decided to conduct a friendly 'knock and talk.'" As they approached, they detected a strong marijuana odor. Gordon knocked and Smith answered, the marijuana odor intensified when the door was opened. "Smith stepped outside and firmly shut the door." The three "engaged in a tete-a-tete on the porch, with Officer Gordon explaining why they were there." She denied consent to enter, and denied any connection to marijuana. She denied consent a second time. Officer Gordon observed that Smith was nervous, "sweating, breathing heavily, and fidgeting." Officer Gordon mentioned the marijuana odor a third time, and Smith admitted that she did smoke it and that a blunt would be found in the house. Officer Gordon told her they could either "freeze" the house and get a search warrant, or she could consent. Smith began to cry and said she feared getting a citation, as she was trying to get her children back. He agreed that what would happened depended upon what they found. Smith invited them to come in. Smith yelled "the cops are here," and "Gordon heard frantic movement upstairs." Gordon ran upstairs and spotted Fischer "swipe his hand across a television stand and then put his hands into his pockets." He refused to bring out his hands so Gordon restrained him and then arrested him. He searched Fischer, finding "crack cocaine, marijuana and cash." The officer also discovered a firearm where Fischer had been seated. Officer Gordon later testified that drugs and paraphernalia were "absolutely everywhere," in the house. A number of items were found in plain view where Fischer was detained. Smith claimed that everything in the house was hers, however. An officer did a protective sweep, but the house was not actually searched.

Smith was charged. She testified at the suppression hearing. She claimed they were on the porch some six minutes, and that she "felt trapped" between the officers and the closed door. There was further dispute as to what was exactly said, with her claiming that officers said they would "make her life a living hell" and that they were "coming in one way or another." The officers denied such statements. Smith denied admitting drug use or the presence of the blunt. Upon questioning, she agreed she gave consent but thought they would simply walk through and leave. She also denied any drugs being in plain view. Smith's motion to suppress was denied and she took a conditional guilty plea and appealed.

ISSUE: Is a knock and talk a legitimate procedure?

HOLDING: Yes

[24] Guzman v. Com., 375 S.W.3d 805 (2012).
[25] Mundy v. Com., 342 S.W.3d 878 (Ky. App. 2011).

DECISION: Smith argued that she was seized while on the porch, but the Court found that the "officers were legitimately on the premises for a knock and talk, a constitutionally sanctioned investigative technique."[26] The Court found no reason to find her actions to be anything but voluntary. Smith argued, as well, that the officers should have gotten a warrant, rather than seeking consent, but the Court disagreed, finding no constitutional duty to seek a warrant as soon as the "bare minimum of evidence needed to establish probable cause is acquired."[27]

The Court was further not persuaded that her consent was anything but voluntary. The officers found no deception on the part of the officers, who told her why they were there and what they were searching for. Officer Gordon correctly noted that they could seek a warrant, as they had sufficient probable cause to seek a warrant – a "statement of fact, not a coercive threat." The officers denied any other threats, as Smith claimed.

With respect to the upstairs bedroom, the Court disagreed it was a protective sweep, finding instead that his entry was "lawful in light of his concern for vehicle safety and the preservation of evidence." In fact, the Court noted, he had consent to be there, as she did not limit it to a "specific room or space." As such, his presence there was with consent. The Court upheld her denial to suppression the evidence.

SEARCH & SEIZURE – TRAFFIC STOP

Morris v. Com., 2015 WL 3937376 (Ky.App. 2014)

FACTS: On June 3, 2012, Det. Johnson (Louisville Metro PD) spotted Morris on a motor scooter. About three months before, the detective had encountered Morris and found his OL suspended. Suspecting that it was still suspended, he intended to make a traffic stop. However, before he could do so, Morris stopped and approached the cruiser. Morris got out and then then turned to return to the cruiser – but Morris fled on foot. He was captured and a loaded pistol was found on his person.

Because Morris was a felon, he was charged with possession of the firearm, along with related traffic and other charges. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does a suspended OL in the recent past justify a stop?

HOLDING: Yes

DISCUSSION: Morris argued that Johnson's prior knowledge of the state of his OL was insufficient to support the traffic stop. The Court noted that a "traffic stop is justified if the police officer has a reasonable, articulable suspicion that the driver is unlicensed."[28] The Court also looked to Deboy v. Com., in which the Court had "held that a police officer's knowledge that a driver's license was suspended at some 'relatively recent time' is sufficient to create reasonable suspicion of unlawful activity and support an investigatory stop."[29] The Court agreed that the three months prior knowledge was recent enough to support the stop.

The Court upheld Morris's plea.

[26] Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).
[27] Kentucky v. King, 131 S.Ct. 1849 (2011).
[28] Bauder v. Com., 299 S.W.3d 588 (Ky. 2009); Delaware v. Prouse, 440 U.S. 648 (1979).
[29] 214 S.W.3d 926 (Ky. App. 2007).

INTERROGATION

Lee v. Com., 2015 WL 2445782 (Ky. App. 2015)

FACTS: On May 2, 2012, Trooper Guilfoyle was dispatched to a sexual assault complaint in Pendleton County. He took written statements from the caller's two children who indicated their step-grandfather, Lee, had repeatedly sexually assaulted them. Three weeks later, Troopers Guilfoyle and Roessler went to Lee's home and engaged him in conversation, while sitting on the porch, for over an hour. He made "self-incriminating remarks" regarding one of the children; he was charged with rape and sexual abuse.

Lee moved to suppress the statements, as he was not given Miranda, but the Court denied him, finding that he was not in custody when he made the statement. On reconsideration, Lee also argued that he was intoxicated at the time, having been drinking heavily and smoking marijuana. The Court again ruled against him. Lee took a conditional guilty plea and appealed.

ISSUE: Is a questioning at a home generally non-custodial?

HOLDING: Yes

DISCUSSION: The Court began by noting that "whether a suspect is in custody for purposes of a Miranda warning is based upon the totality of the circumstances." The evidence indicated the troopers never entered the home, "physically restrained Lee or touched him in any hostile or aggressive manner." Although he admitted to being nervous, Lee "never indicated that he wanted" the troopers to leave. The Court agreed that "any questioning by a police officer can make a suspect nervous, especially where the questioning lasts more than a few minutes." However, that does not mean the subject is in custody. The Court agreed in this situation, a reasonable person would have understood that they could "refuse to answer the police officers' questions and terminate the interrogation."[30] As such, Miranda was not required.

With respect to his argument about intoxication, the Court noted that "no constitutional provision protects a drunken defendants from confessing to his crimes."[31] The Court also acknowledged that "if we accept the confessions of the stupid, there is no good reason not to accept those of the drunk."[32] Although extreme intoxication, to the point of confabulation or mania, might be enough to suppress statements, lesser levels of intoxication would not. The troopers described his speech as clear, not slurred, and one noted that "he had no sense that Lee had any trouble understanding his questions." The Court found no evidence that "he was not in sufficient possession of his faculties to make a reliable statement, or that his cognitive abilities had been affected to the extent that his statement was involuntary." The Court noted that "his answers tracked the questions" and "he appeared coherent and well-oriented as to time, place and day." He appeared to appreciate the gravity of the charges he was faced with and the potential consequences.

The Court agreed that the denial of suppression was proper.

Com. v. Goslyn 2015 WL 2357374 (Ky. App. 2015)

FACTS: Jessie Goslyn was charged with murder in the death of her husband, Vincent, in Christian County, on February 3, 2012. On that date, she had been brought to the Sheriff's office by a deputy for an interview by Det. Williams. She was brought into the office through a back door, to a room near that door. She was "crying and dry-heaving." She was given Miranda warnings and reportedly signed a waiver, although it was not included in the court record. She was interviewed for an hour, including breaks, and ultimately ended when "Jessie told Detective Williams that he was not answering her

[30] Peacher v. Com., 391 S.W.3d 821 (Ky. 2013).
[31] Peters v. Com., 403 S.W.2d 686 (Ky. 1966).
[32] Britt v. Com., 512 S.W.2d 496 (Ky. 1974).

questions about her husband's health and Jessie said that she wanted to speak with an attorney." He then told her that her husband was dead.

Following the interview, a friend and neighbor was allowed to bring her a change of clothing at the station. Goslyn had spoken to that neighbor after to the killing, and when the neighbor arrived, she was instructed by law enforcement to write down what had been said. Goslyn left with the neighbor, and when she arrived at their house, the neighbor's husband gave his wife a card to contact "CID" - and Special Agent Palmer told her that she either needed to come to them or he would come to the neighbor's house.[33] The neighbors went to talk to the agent and were interviewed. In a call later that day, CID told the neighbor that she needed to get Jessie to come in and talk to them, since she had not cooperated with the Sheriff's Office. She agreed to do so. During a subsequent lengthy interview, Jessie made a number of statements.

Ultimately, she requested suppression. The Circuit Court granted the motion, finding that "Jessie was in custody when she was interviewed at the sheriff's department on February 3, 2012; that Jessie invoked her Fifth Amendment right to counsel [later corrected to say Sixth Amendment] during that custodial interrogation on February 3, 2012; and that Jessie did not initiate the subsequent communication with law enforcement, making any contact between Jessie and law enforcement prohibited."

The Commonwealth appealed.

ISSUE: Is being held without an option to leave, at a police station, custody?

HOLDING: Yes

DISCUSSION: The Court first looked to whether Jessie was in custody when interviewed at the Sheriff's Office. The Court noted she was not apparently given any option but to go and was taken by a deputy into a restricted entrance. She was questioned, but not provided with answers to her own questions. Although the neighbor was called to bring her clothing and take her home, Jessie was "not immediately allowed to leave." The court noted that "a suspect is only required to be informed of her Miranda rights when the suspect to be questioned is 'in custody.'" The interrogation stopped when she asked for an attorney, which, the Court noted, is "Interestingly, this is exactly what is required to occur in a custodial interrogation when the suspect invokes her right to counsel, yet the Commonwealth persists in arguing that Jessie was not 'in custody' during the interview." She was not allowed to leave immediately when her friend arrived, and she was required to change clothes. As such, the Court noted, she was "in custody."

Next, the Court looked to the first assertion that the neighbor was used as a "third-party actor" The Court agreed that "Special Agent Palmer asked Kay to encourage Jessie to speak with him about the investigation when Kay called (of her own volition) to ask if media would be allowed on post." The Court agreed he should have known that Jessie had invoked her right to counsel previously, since he mentioned she'd been uncooperative. There was no other indication that she had "any desire to reinitiate contact with law enforcement until Kay encouraged her to talk to Special Agent Palmer." Further, under Edwards v. Arizona, when a "a suspect asks to speak with an attorney, the interrogation must stop until an attorney is present."[34] With respect to third party involvement, in two separate cases, the Court found that "questioning by a party who is not a law enforcement officer may constitute a 'custodial interrogation' (which entails state action) in two primary circumstances." The first is when the private entity is operating in accordance with a court order or governmental regulation and is thereby properly viewed as a "state actor."

The second circumstance occurs when the government otherwise exercised such coercive power or such significant encouragement that it is responsible for [the private party's] conduct.[35] The Court agreed that

[33] All of the parties were connected to Fort Campbell, and CID is the military investigation branch.
[34] Edwards v. Arizona, 451 U.S. 477 (1981).
[35] Adkins v. Com. , 96 S.W.3d 779 (Ky. 2003). Roberson v. Com., 185 S.W.3d 634 (Ky. 2006),

"Pursuant to Edwards, a suspect re-initiates discussion with the police after invoking the right to counsel "when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case."[36]

In this case, the Court noted that:

> … at the time when Kay encouraged Jessie to tell authorities what she knew, Jessie was not in any type of custodial setting at all and was free to do whatever she wanted. Moreover, there is nothing before us to suggest that Kay was in any type of a special relationship such that she would be in a position to put undue influence or coercion on Jessie to cause Jessie to speak to the authorities against her will. And, there is absolutely no evidence in the record to show that Jessie's statements to Special Agent Palmer and Detective Greene were the result of severe duress or physical force. Therefore, the circumstances present in this case were not compelling enough to be deemed "coercive." Further, Kay testified that she was present when they read Jessie her Miranda rights before they began speaking with her. Given the totality of the circumstances, we find that Jessie's waiver of her right to counsel was voluntary, knowing, and intelligent.

The Court reversed the order of the Christian Circuit Court, which granted the motion to suppress.

Kyle v. Com., 2015 WL 2267084 (Ky. 2015)

FACTS: Kyle was charged with two armed robberies from cash advance stores within five days, in Warren County. In the second robbery, a witness followed the robber to the backyard of a house, and the witness directed police to the house. They approached and tried to talk to a woman (Jaji) sitting on the front porch, Kyle's girlfriend, but she was uncooperative and refused to consent to a search of the house. The officers set up a perimeter. Jagi went inside and then came back out and agreed to a search. The officer did not find the robber, but did find evidence linked to the robbery. They also "encountered a locked bedroom door for which Jaji claimed to lack the key." Jaji's grandmother arrived and consented to a full search, during which officers found a trap door to a crawlspace where Kyle was found hiding.

In addition, they found a jacket matching that described by witnesses and a "hidden stash of money in the bathroom." In her vehicle, they found additional evidence that linked him to the crime. Kyle was arrested and taken to the station. "During the interrogation, Kyle repeatedly attempted to end the questioning but his demands were ignored. After a relatively short period of questioning, Kyle confessed to the robberies." He was indicted on multiple counts of robbery and theft. He was convicted.

In a separate incident, some two months before the above robberies, Dunlavy, a WKU student, was moving items from his car to his apartment. He was approached by a subject with a knife and robbed of his wallet. A suspect was not identified until the above robberies, when a tip connected Kyle to that robbery. He was visited by detectives and ultimately confessed to that robbery as well, but claimed the "knife" was actually a screwdriver. He was convicted of that robbery as well. He appealed all three convictions.

ISSUE: Is "I'm through talking" an invocation of the right to silence?

HOLDING: Yes

DISCUSSION: Kyle argued that his interrogation continued after he made repeated attempts to end it. He had waived his Miranda rights but when the questioning intensified, he said he was "through talking." The trial court denied suppression of the statements because "despite Kyle's repeated declaration to the detective that he was through talking—Kyle never stopped answering the detective's persistent questions."

[36] U.S. v. Whaley, 13 F.3d 963 (6th Cir. 1994).

The Court continued:

> The right to silence is crucial during the interrogation setting. In Michigan v. Mosley, the Court made clear how important a suspect's right to silence is in this context: "Through the exercise of his option to terminate questioning,[the suspect] can control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation." Of course, any suspect who "desires the protection of the privilege . . . must claim it." This invocation of the right to silence must be unambiguous. And any incriminating statements made in response to police questioning following an unambiguous invocation should be suppressed.[37]

The Court allowed that even if "I'm through talking" is somehow ambiguous, that it was "unable to imagine how "I'm through talking" could be construed as meaning anything other than exactly what it says: I no longer wish to talk." Instead of trying to clarify, however, the "detective chose to push forward with the interrogation." While he did keep talking, "it was only in response to the detective's comments." Looking to Smith v. Illinois, the Court agreed ""[u]nder the clear logical force of settled precedent, an accused's postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself."[38]

Although the Court agreed that the prosecution's case "involved strong direct and circumstantial evidence, but inconsistent eyewitness testimony was also shown." And, the Court noted, it could not "overestimate the contribution Kyle's confession may have played in his guilty verdict." After all, "[a] confession is like no other evidence. Indeed, the defendant's own confession is probably the most . . . damaging evidence that can be admitted against him."[39] We cannot say with any confidence—certainly not beyond a reasonable doubt—erroneously admitting Kyle's confession did not contribute to his conviction.

The Court reversed his convictions.

On an unrelated note, the Court discussed the issue of Kyle being leg-shackled during the trial. The Court placed an underpinning around the defense table so it would not be obvious to the jury.

The Court noted:

> Our stance on shackling defendants during trial is clear and longstanding: only when confronted with extraordinary circumstances is the practice allowed. Before a trial court may allow shackles or other restraints to remain on a defendant at trial, the trial court must first "encounter[] some good grounds for believing such defendants might attempt to do violence or to escape during their trials." In the past, we have approved of such "good grounds" when trial courts were faced with defendants who previously had fled the courtroom, were belligerent in proceedings before trial, or were skilled in martial arts and had a history of flight. [40]

In this case, the Court found no such basis for shackling him, but noted the attempt to conceal the shackles. Since he did not object, the Court did not object either. With respect to the conviction on the earlier robbery, the Court noted that it was the same detective. However, the Court noted, there was a 10 day break between the two interrogation, and there was little to no police contact in between. There was no evidence of coercive tactics or any indication that his confession in that situation was involuntary. Although agreeing that he should have had an evidentiary hearing on the matter, the court found the error to be harmless.

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[37] 423 U.S. 96 (1975); Bartley v. Com., 445 S.W.3d 1 (Ky. 2014) (quoting U.S. v. Monia, 317 U.S. 424 (1943); Berghuis v. Thompkins, 560 U.S. 370 (2010).

[38] 469 U.S.91 (1984).

[39] Arizona v. Fulminate, 499 U.S. 279 (1991)

[40] Barbour v. Com., 204 S.W.3d 606 (Ky. 2006). Deck v. Missouri, 544 U.S. 622 (2005),

Goff v. Com., 2015 WL 2155692 (Ky. App. 2015)

FACTS: Goff was accused by his 13-year-old daughter of sexual abuse, on June 17, 2011. He was out on the road when Det. Propes (KSP) initiated the investigation. Goff appeared voluntarily on September 21, 2011, at the post for an interview, held in a room at the post. He and Det. Propes were the only people present. He admitted most of the allegations (that he had shown his daughter his penis and allowed her to touch it). He left after the interview but was subsequently charged. He moved for suppression, arguing that he was not provided with Miranda prior to the interview. He later stated that "he felt like he should leave the interview, but he did not feel like he could leave and that if he did not stay and talk he would be arrested."

The Court denied the motion to suppress, finding that "a reasonable person in Mr. Goff's position would not believe he was in custody, and therefore Miranda warnings were not necessary." The Court looked to a number of factors: "Mr. Goff was told he was free to leave at any time; Mr. Goff left after the questioning; at no time was Mr. Goff placed under arrest; Detective Propes was not wearing a police uniform nor did he brandish his weapon; Mr. Goff and Detective Propes set up a time for the interview; Detective Propes was the only officer involved in the questioning; Detective Propes used a proper tone; and that Mr. Goff was not handcuffed or otherwise physically restrained."

Goff was convicted of Sexual Abuse 1st and appealed.

ISSUE: Is questioning at a police station always custodial?

HOLDING: No

DISCUSSION: For a subject "to be in custody he must be either 1) under arrest; 2) there must be a restraint of his freedom; or 3) there must be a reasonable restraint on freedom of movement to the degree associated with formal arrest."[41] This determination "does not depend on the actual belief of the defendant, but rather, when looking at the totality of the circumstances, whether or not a reasonable person would believe that he was free to leave." Being questioned at the post "does not automatically mean a defendant is in custody for purposes of Miranda."[42] As such, for Goff to succeed, "he must prove one of the prongs in the Miranda test established in Baker v. Com. That is, he must prove that either 1) he was under arrest; 2) there was a restraint of his freedom; or 3) there was a reasonable restraint on freedom of movement to the degree associated with a formal arrest." In looking at the facts, the Court found it to be clear that he was never in custody at the KSP post, no matter how he "felt" about it.

The Court upheld Goff's conviction.

Farra v. Com., 2015 WL 3631603 (Ky. 2015)

FACTS: Farra, a high school student, age 17, was charged in Jackson County with three counts of Sodomy 1st involving his 4 year old nephew, Steven. As part of the investigation, Trooper Reed and Det. Peters interviewed Farra, in the counselor's office at the high school. Trooper Reed gave Farra his Miranda rights and Farra acknowledged his understanding and waived those rights. During the interview, he broke into tears and confessed. He acknowledged, on a recording, that "he knew he was not under arrest; he had been advised he was free to leave; he had spoken of his own free will; and no threats or promises had been made."

At trial, however, Farra testified that "he thought he was not free to leave and that Trooper Reed threatened him with arrest if he did not confess." He was on probation for unrelated charges and had prior experience with law enforcement. The Court upheld the confession.

Farra was convicted and appealed.

[41] Baker v. Com., 5 S.W.3d 142 (Ky. 1999). Com. v. Lucas, 195 S.W.3d 403 (citing Thompson v. Keohane, 516 U.S. 99 (1995)).
[42] California v. Beheler, 463 U.S. 1121 (1983); see also Oregon v. Mathiason, 429 U.S. 492 (1977).

ISSUE: May a 17-year old make a decision on whether to talk or not during an interrogation?

HOLDING: Yes

DISCUSSION: The Court noted that the trial court had not specifically addressed whether Farra was in custody during the interrogations, "because the obligations to advise Farra of his rights and to notify his parents are directly tied to the issue of custody." The Court looked to intervening case law and noted that it concluded Farra was not, actually, in custody … as "no school officials participated in the interrogation." Due to the facts, as presented, the Court found "little doubt that Farra knew that he was not being questioned about a school discipline matter." The Court concluded that "and noting in particular Farra's admissions that he had been advised of his rights; he knew he was not under arrest; he knew he had the right to remain silent; and he was more than seventeen years of age, we hold that Farra was not in custody."

The Court also briefly address his assertion that he was not given adequate warnings, the Court noted he did sign the card once (although not twice, as the card has two places for a signature, for each of the waiver questions) and that he stated, in the recording, that he was acting in his own free will. His prior experience with law enforcement suggested he was well aware of his rights. He claimed the trooper threatened him with jail time, but the court noted that even if this was the case, it came after he waived his rights, so the trooper " could not have coerced him into doing something he had already done."

With respect to contacted Farra's parents, the Court noted that "KRS 610.200(1) provides that an officer must notify a child's parent immediately upon taking the child into custody." But because the court agreed that he was not in custody, notification was not required.

The Court concluded that the trial judge was in the best position to judge the facts, and that court "chose to believe that nothing unduly coercive occurred." The Court upheld Farra's conviction.

SUSPECT IDENTIFICATION

Foulks v. Com. , 2015 WL 3533264 (Ky. App. 2015)

FACTS: In August, 2012, a Paducah KFC was robbed. While the three employees inside were held up – a customer, who witnessed it through the drive-thru, called 911, giving a general description of the one gunman he saw. Watkins, an employee, identified the robber as someone who had come into the store minutes before. Fingerprints matched Shumpert and one of the responding officers noticed a distinctive vehicle he connected to Shumpert – video placed the car in the area of the KFC at the right time. Harris, another employee, identified the man with the gun as Foulks, someone with whom he was acquainted with through family, by his appearance and his voice. She later identified a man shown to her in a showup as Foulks although in fact, it was not – although she qualified her ID by saying she wasn't wearing her glasses and that he was wearing different clothing. She later identified a photograph as well.

Foulks and Shumpert were both charged and tried with Robbery 1st. Foulks' girlfriend also gave incriminating information that she later tried to recant. Ultimately, Foulks was convicted and appealed.

ISSUE: Is an initial confrontation set up by someone other than law enforcement enough to taint further identifications?

HOLDING: Not necessarily

DISCUSSION: Foulks argued that the suspect identification process used was highly suggestive. He noted that the first, erroneous identification made the later identification unreliable and that the second

identification, of a single photo, was improper. The court looked to Malone v. Commonwealth,[43] and noted that:

> [the identification] evidence is for the jury to weigh. We are content to rely upon the good sense and judgment of American juries, for evidence with some element of untrustworthiness is customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable feature.[44]

The Court noted that "Foulks was not initially identified through a confrontation situation setup by government agents." Instead, he was identified by personal knowledge of the witness and the second ID was done just to confirm that they were on the same page. In Barnes v. Commonwealth, the Kentucky Supreme Court upheld a conviction based, in part, on an out-of-court identification in which a witness was asked to confirm her identification of the defendant based upon a single photograph.[45] The Court stated, "[t]here's certainly nothing wrong with a witness being allowed to reaffirm the accuracy of her previous identification as long as that previous identification has not been impermissibly suggestive or tainted."

The Court agreed that the misidentification went simply to the weight, not the admissibility, of the ultimate ID. As such, the denial of the motion to suppress was proper and Foulks' conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – DNA EVIDENCE

Crawford v. Com., 2015 WL 1968775 (Ky. App. 2015)

FACTS: In 1990, Mirath was violently assaulted, sodomized and raped in her Jefferson County home. After her attacker left, she was able to get out of the house, still naked and partially bound. A passing driver assisted her, covering her with a blanket. A rape kit was done. The crime went unsolved until Crawford was incarcerated in 2006. DNA was taken and a match came up, restarting the "dormant investigation." DNA had also been obtained from the blanket, which showed a mix of Minrath's DNA and Crawford's. At trial, however, since the DNA results from the kit had not been provided from the defense, that evidence was not admitted at trial.

Crawford was convicted on several charges and appealed.

ISSUE: Is a denial to use DNA evidence enough to overturn a verdict?

HOLDING: No (but see discussion)

DISCUSSION: Crawford argued that the move to exclude the DNA evidence was improper, apparently arguing that "this evidence would have shown someone else committed the rape." The Court noted that was a proper action under the circumstances. Further, he argued, the sheet used at the hospital should have been tested (it was not) and that the failure to do so by his counsel was deficient. The Court agreed that it was only speculation that relevant DNA would be found. The Court agreed, however, that the failure for trial counsel to use a retained DNA expert should have been examined in a hearing and remanded the case for that reason.

Releford v. Com., 860 S.W.2d 770 (Ky. App. 2015)

FACTS: On September 7, 2012, at about 3 a.m., Bhattacharyya was attacked while walking home in Lexington. She was carrying a knife and was able to slash her attacker, who fled, trailing blood. An hour later, Releford entered a Harrodsburg hospital with knife wounds, claiming he'd been attacked while assisting a motorist change a tire. The Mercer County SO became involved. They learned of the attack

[43] 364 S.W.3d 121 (Ky. 2012).
[44] Manson v. Brathwaite, 432 U.S. 98 (1977).
[45] 410 S.W.3d 584 (Ky. 2013).

on Bhattacharyya and conveyed the information to Lexington. Det. Anderson, working with Captain Elder (MCSO) set up an interview with Releford. Releford gave consent to providing a buccal swab, which, he'd been told, would be useful if the knife involved was recovered. Releford was connected to the attempted rape and assault through his DNA.

Releford moves for suppression, arguing that he'd been coerced into providing the swab. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is a ruse to obtain DNA permitted?

HOLDING: Yes

DISCUSSION: The Court noted that while a DNA swab is a search, that "ruses are not unconstitutional," as a rule.[46] Certain, however, special circumstances might render a consent invalid. However, in this case, Releford was not in custody and was never asked about Bhattacharyya.

The Court upheld his plea.

TRIAL PROCEDURE / EVIDENCE – SEXUAL ASSAULT CHARGES / INVESTIGATIVE HEARSAY

Ruiz v. Com., 2015 WL 2340406 (Ky. 2015)

FACTS: On November 28, 2012, Linda, age 6, reported to her grandmother (her caregiver at the time, since her mother – Ruiz's wife – was on deployment) that she'd been sexually assaulted by Ruiz multiple times. She was examined and ultimately, Ruiz was charged with Sexual abuse and Sodomy (specifically both anal and oral). He was convicted of Sodomy (oral) and Sexual Abuse. He then appealed.

ISSUE: 1) Must individual sex acts be proven?
2) Is investigative hearsay permitted?

HOLDING: 1) Yes
2) No

DISCUSSION: During her testimony, Ruiz argued that his right to a unanimous verdict was violated because the victim "testified to multiple indistinguishable instances of sexual abuse and multiple indistinguishable instances of sodomy as having occurred during the relevant time period, and so there is no assurance that each of the jurors were focused upon the same occurrence when they cast their respective guilty votes."[47] The Court noted that "as in many cases of child sex abuse, Linda was the only eye-witness to the crimes charged against" Ruiz. She was not asked to "isolate and identify any individual episode of sexual abuse or sodomy that would relate the specific crime to the instructions to be given to the jury." – instead "her testimony described a generalized, nonspecific and undifferentiated continuing course of conduct of sexual misconduct perpetrated by [Ruiz]."[48] Without specific instructions, the "jury was left to adjudicate guilt on any or all of the vaguely alleged incidents, resulting in a verdict of doubtful unanimity." Since the victim testified as to many instances of abuse, with it occurring 2-3 times a week over five months, the Court agreed that the "the probability that all jurors agreed on the same event substantially declines." Further, serial acts of sexual abuse are not a "course of conduct" crime – and the prosecution "must charge and prove sex crimes as specific, individual acts of criminal behavior." The Court found the error to be "jurisprudentially intolerable" and reversed the judgement.

[46] Krause v. Com., 206 S.W.3d 922 (Ky. 2006).
[47] Johnson v. Com. , 405 S.W.3d 439 (Ky. 2013),
[48] The court also noted that the child victim would use, for example, the term "front" to describe both male and female genitalia.

Although the case was overturned, the Court chose to address another issue as it determined that it might arise again. Prior to trial, Ruiz was successful in obtaining an order to "prevent the Commonwealth from eliciting "investigative hearsay" from any of its witnesses." However, he complained that in fact, the first witness was permitted to do so. The Court noted, specifically:

> Lest our repetition of the term "investigative hearsay" be misconstrued, we state here without equivocation: there is no such thing in our jurisprudence as "investigative hearsay." There is no special rule of evidence known as "investigative hearsay." The term simply is not a part of the evidentiary lexicon.

Further, the Court said:

> Despite our condemnation in Sanborn v. Commonwealth, of what has been termed the "investigative hearsay" rule, it is still invoked on occasion.[49] Perhaps we have failed in our decisions to vanquish it with sufficient vigor to send the message. We said in Sanborn, "Prosecutors should, once and for all, abandon the term 'investigative hearsay' as a misnomer, an oxymoron." We now extend that suggestion to all of the bench and bar.
>
> The use of the term exposes a fundamental misconception about the nature of the evidence it purports to describe; what it purports to describe is far more effectively, and more precisely, explained by the basic definition of hearsay itself and the conventional rules of evidence pertaining to hearsay. The term, "investigative hearsay" creates the false impression that there is a special or unique species of hearsay evidence that abides by its own rules removed from the rigors of ordinary hearsay law. Using this inartful term serves only to muddle the analysis of issue at hand and to distort the language by which hearsay issues must be resolved. In its most common application, the term "investigative hearsay" is tagged to an out-of-court statement made to, or in the presence of, a police officer, such that it tends to explain subsequent investigative action taken by the police as a result of the statement. See Gordon v. Commonwealth, 916 S.W.2d 176, 179 (Ky. 1995); and Young v. Commonwealth, 50 S.W.3d 148, 167 (Ky. 2001). We said recently in McDaniel v. Commonwealth: "[I]nvestigative hearsay' is a 'misnomer . . . derived from an attempt to create a hearsay exception permitting law enforcement officers to testify to the results of their investigations.' This erroneous basis for the admission of hearsay evidence was rejected in a line of cases beginning with *Sanborn []."* 415 S.W.3d 643, 652 (Ky. 2013) (citations omitted).

The Court continued by noting that "To be clear, there is no special rule regarding out-of-court statements made to police officers investigating crimes."

Instead, the Court stated the "conventional rules of evidence and the traditional evidentiary vocabulary are perfectly suited to describe the legal concept at hand." An out of court statement made to a law enforcement officer "is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. If it is relevant and probative only to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. And, as any other statement, if the out-of-court statement made to a police officer has relevance and probative value that is not dependent upon its truthfulness, and it is not offered into evidence as proof of the matter asserted, then by definition the evidence is not hearsay.

The Court pointed to several examples of what was, and not is not hearsay in such situations. It focused on the reason for admitting the statements and whether it was to prove the "truth of the matter asserted." In some cases, it might be "offered to explain the action that was taken and has relevance regardless of whether the statement was true or false. Most "So-called "investigative hearsay" is still, fundamentally, hearsay.[50] There is no special kind of evidence known as "investigative hearsay;" we have

[49] 754 S.W.2d 534 (Ky. 1988) (overruled on other grounds by Hudson v. Com., 202 S.W.3d 17 (Ky. 2006)),
[50] Chestnut v. Com. 250 S.W.3d 288 (Ky. 2008).

no rule of evidence called the "investigative hearsay rule." Use of the term imparts no meaningful information to the analysis that is not otherwise supplied by the word "hearsay."

In addition, the Court agreed, the detective was "improperly permitted to bolster the family members' testimony." The detective testified as to the demeanor of the family members he interviewed, as well as the victim – in effect, indirectly vouching for the credibility of those witnesses. The Court agreed that under Ordway v. Com., that a witness may describe another person's "conduct, demeanor, and statements [ ] based upon his or her observations to the extent that the testimony is not otherwise excluded by the Rules of Evidence."[51] However, it is "well established that a witness may not vouch for the truthfulness of another witness.[52] Looking at what was specifically said, the Court noted that the detective "did not express a view upon the veracity of Linda and her family." He described their demeanor specifically and while that might suggest an effort to arouse sympathy (a separate concern) it was not so much intended to enhance their credibility. The Court agreed that his "testimony that Linda's family members were overwrought by the allegations, and that he, too, was emotionally affected by their anguish, should not be admitted."

Finally, the Court noted, the detective's statement that he found "probable cause" sufficient to prepare a report was improper, and "could be readily understood to mean that he personally believed Linda's account." As such, it was enough to invoke the rule against vouching and should not be permitted in any retrial.

The Court vacated the trial court's decision and remanded the case.

Buckley v. Com., 2015 WL 2339921 (Ky. 2015)

FACTS: While in Lexington, Buckley established relationships with two different women and fathered three children between them. One, Jane, had a lengthy relationship with him, even while he was out of the country, but during a brief breakup, had sex with one of Buckley's friends, Ben. When Buckley learned of it, on May 28, 2010, they engaged in a series of texts and phone calls over a number of hours. Buckley was abusive and derogatory and he threatened to post nude photos of Jane. Jane defended her actions by noting they were not a couple at the time and she had not "cheated" on him. She invited him to her house to talk; he refused, again threatening to post the photos. She threatened suicide and told him to bring her a gun.

At 10:30 a.m. on May 29, she did go to his house. The couple engaged in oral, anal and vaginal sex, which Buckley stated was consensual and typical – although noting that the anal sex was "accidental." Jane testified the sex was not consensual and that she'd been forced to participate. About five minutes of the sex was recorded.

Jane left about an hour later; Jane went home and called 911. She was taken to the hospital and examined, and evidence consistent with a sexual assault was found. Buckley was ultimately charged and convicted. He then appealed.

ISSUE: Do implied threats indicate forcible compulsion?

HOLDING: Yes

DISCUSSION: Buckley argued that the Commonwealth had failed to prove forcible compulsion. The Commonwealth noted that it had proven "implied and express threats, as well as actual physical injury." The jury had access to the video (as well as two other videos submitted apparently to put their usual sexual relationship into context). Buckley argued that his slapping of her was part of the "normal sexual activity" and that when she screamed upon anal penetration; it was accidental, not intentional. The

[51] 391 S.W.3d 762 (Ky. 2013)."
[52] Stringer v. Com., 956 S.W.2d. 883 (Ky. 1997) (citing Hall v. Com., 862 S.W.2d 321 (Ky. 1993)); Hoff v. Com., 394 S.W.3d 368 (Ky. 2011)."

Commonwealth pointed to several statements he made on the recording which suggested that he would allow others to have sex with her, that he would smack her and that she would "have to do whatever he wanted 'from now on.'" He claimed his threat to post the photos was not an implied threat of physical harm.

The Court noted that in such cases, the subjective standard must be used. Jane was much smaller than Buckley, and knew what he'd been capable of in the past, having seen him "severely beat five men." She'd never seen him so angry and he'd never treated her badly before, although they'd engaged in playful rough sex and name-calling in the past. In the other videos, she'd not been heard, crying, sobbing or screaming, and she said choking and biting had not been part of their prior sexual activity. She also knew he kept a firearm immediately available.

The Court also agreed that Jane's testimony about prior activity was properly admitted under KRE 404(b)'s three prong test: "(1) Is the evidence relevant? (2) Does it have probative value? (3) Is its probative value substantially outweighed by its prejudicial effect?[53] The Court agreed testimony about guns in the home was relevant to Jane's state of mine, but the Court was "concerned" about the fact that the actual guns were actually introduced as evidence – but found it to be harmless error.

Buckley also complained it was improper to show the ERU team actually making the arrest, as shown in a video. "The video shows the police breaking into Buckley's apartment, arresting him, handcuffing him, and searching his bedroom. During his arrest and the search of his apartment, Buckley appears to be calm and cooperative." Again the Court agreed it was improper to allow it to be introduced, and in fact, his demeanor during the arrest undercuts Jane's testimony about his attitude that day. As such, the court found its introduction to be harmless.

Jane's testimony about the bar fight and his beating of five men, at one time, was relevant and probative to her awareness of what he could do when provoked.

Following other evidentiary rulings, the Court upheld Buckley's conviction

TRIAL PROCEDURE / EVIDENCE – TRANSLATION

Lopez v. Com., 2015 WL 2340170 (Ky. 2015)

FACTS: Lopez, a Honduran national, married his wife, Johanna, in New York. They later moved to Glasgow in May, 2010, and subsequently, to Pennsylvania. While in Pennsylvania, Johanna learned that Lopez had a sexual relationship with her daughter, who was 12-15 at the time, that started in New York and continued in Kentucky. At that time, she left Lopez and returned to Kentucky, while Lopez went back to New York. In Kentucky, Johanna contacted KSP and ultimately, Lopez was charged and extradited back to Kentucky.

In Kentucky, Det. Adams and Melgar, a translator, interviewed Lopez. (Melgar was from El Salvador and worked as a translator for a local hospital.) Melgar translated the Miranda rights for Lopez, who agreed to answer questions and essentially confessed. He was convicted and appealed.

ISSUE: Must an interpreter be court-qualified to assist in an interrogation?

HOLDING: No

DISCUSSION: Lopez objected to the use of Melgar's translations because he was not a "court-certified interpreter." The trial court had denied that motion. The Court noted that the "the requirements to qualify as an interpreter under the Kentucky Rules of Evidence [Rule 604] differ from the requirements to qualify as an interpreter under KRS 30A.400 et seq." Under the KRE, ""an interpreter is subject to the

[53] Bell v. Com., 875 S.W.2d 882 (Ky. 1994).

provisions of these rules relating to qualifications of an expert . . . ." A person who has the requisite "knowledge, skill, experience, training, or education may testify" as an expert." Melgar had testified as to his knowledge and background as a native Spanish speaker and a hospital translator. The trial court was never asked to rule on the admissibility of Melgar's translations, but, it was noted, his qualifications were sufficient to find he was an "expert." Factors such as his Spanish being of a different dialect "go to the weight, … not to their admissibility." The court was not obligated to hold a Daubert hearing, either.[54] The court noted that his objections "raise a number of issues, including what qualifications are necessary for an interpreter and whether the legislature can determine what evidence is admissible." However, the Court noted, Lopez did not show how the statement caused any harm to him, as the evidence of his guilt was overwhelming. He pointed to no translation errors, either. Further, Det. Adams giving evidence as to what Lopez said was hearsay, as he had no personal knowledge of what was actually said. Instead, Lopez's statement "statement fits squarely within KRE 801(A)(b) as an admission by a party opponent, making Detective Adams's testimony clearly admissible." Inserting the services of a translator (a "mere conduit" into the process does not change the nature of the statement. As there was no proof (or even allegation) that the "translation is inaccurate or misleading," the Court properly allowed it to be admitted.

TRIAL PROCEDURE / EVIDENCE – SUPPRESSION HEARING

Johnson v. Com., 2015 WL 3635292 (Ky. 2015)

FACTS: On February 25, 2013, a series of burglaries occurred in Boyle and Lincoln, starting at about 2 a.m. A Boyle County deputy responded to an alarm at a store – the security video was viewed by the deputy, but not secured, and was apparently deleted. Later that morning, Junction City PD responded to a burglary at a gas station. Security footage from that break-in showed a black and a white male, wearing, among other things, "distinctive sneakers." Still later, a golf course was burglarized and some surveillance video was captured – but rather than getting a copy, the "deputy recorded the playback of the video with his cell phone." Nothing was taken but there was extensive damage. The spree continued into Lincoln County. Sgt. Thacker, Lincoln County SO, tried to pull over a black SUV (similar to what was seen in the video) but the driver successfully evaded him. The SUV was found abandoned and when searched (pursuant to a warrant) a "substantial amount of cash and other items from the burglarized stores" was found. In addition, an Indiana OL for Roach was found and the SUV had Indiana plates.

Later that day, Sheriff Folger (Lincoln County) reported that Stovall was going door to door, in the area where the vehicle was found, trying to solicit a ride. The Sheriff testified that he'd spoken with people in the area and explained they were looking for a black male and two white male suspects. He received a call from a special deputy relating he'd seen a black male getting picked up by a taxi headed toward Stanford. It picked up another person, Johnson, and headed back towards Garrard. (The Sheriff noted that it was ""very unusual" for people to "hail or be picked up by a taxi in that area.") Lancaster PD was notified and found the vehicle, with the Sheriff hurrying to catch up. The taxi was located and stopped in Garrard County; Stovall and Johnson discovered to be passengers. They were taken to the Sheriff's office. They matched the clothing and the shoes of the suspects. During the investigation, Johnson's fingerprints were found to match a black plastic bag located in the SUV.

Johnson was arrested and moved to suppress the evidence, arguing the taxi was illegally stopped. At trial, Sheriff Folger testified as to what he'd been told by the special deputy, that triggered the stop, and Officer Stratton testified as to what he'd seen on the surveillance Johnson was convicted and appealed.

ISSUE: If an officer has probable cause, does he have reasonable suspicion to stop the vehicle in which the suspects are riding?

HOLDING: Yes

[54] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

DISCUSSION: The Court noted that only the Sheriff testified at the suppression hearing, but that it had "consistently held that a law enforcement officer's testimony alone is enough to constitute "substantial evidence."[55] The Court noted that Johnson did not object to the stop of the taxi itself, which required reasonable suspicion, but only the arrest, which requires probable cause. The two were clearly differentiated in the court proceeding. To make an arrest, the Court noted it must "determine whether an officer had probable cause to arrest an individual, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause."[56] "Probable cause for arrest involves reasonable grounds for the belief that the suspect has committed, is committing, or is about to commit an offense."[57] Leading up to the stop, the Sheriff had a great deal of information about the situation and "the stop occurred during an ongoing investigation, with law enforcement in active pursuit of the suspects from a series of felony burglaries that occurred approximately twelve hours earlier." The Court detailed all of the information available to the Sheriff and agreed it was proper to first, stop the taxi and second, to identify Johnson and Stovall as being involved in the burglaries. As such, the arrest, and everything that flowed from it, was proper.

Johnson also argued it was improper to permit the Sheriff to testify as to what Special Deputy Akers told him, when apparently, Akers was not available at trial. However, because he did not raise a proper objection, the Court permitted the testimony to be admitted. With respect to Officer Stratton's testimony, the Court noted that the Best Evidence Rule (KRE 1002) was violated by the non-production of the video. However, the Court noted, another rule, KRE 1004) notes that ""the original is not required, and other evidence of the contents of a writing, recording, or photograph is admissible if ... [41 originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith ...." KRE 1004(1). The Commonwealth properly called the store owner to testify that the recording had been inadvertently lost, apparently by rerecording, before it could be copied. (When the officer returned at a later date, he learned it had been destroyed.) The evidence was thus not lost by the law enforcement officer, but by the store owner, not a government actor. And, the Court agreed, "any possible prejudice was eliminated because the trial court gave a missing evidence instruction, allowing the jury to infer that the lost video would be favorable to Johnson's case if it were available." The Court agreed that Officer Stratton's testimony was permitted. Further, the Court agreed, Officer Stratton's testimony was not hearsay, nor did it violate the confrontation clause, and he was available as a witness to be challenged on his testimony, as well.

On an unrelated note, the court agreed that a 'stiff-leg" restraint was properly used on Johnson, that was the least restrictive alternative to handcuffs and shackles. Law on the subject that prohibits restraints have "been primarily concerned with traditional, *visible* restraints, such as chains and shackles." The restraint used on Johnson was not visible to the jury and while such restraints should not be routinely used, they did not cause harm in this situation.

The Court upheld Johnson's conviction.

TRIAL PROCEDURE / EVIDENCE – RULE 7.24

Trigg v. Com., 460 S.W.3d 322 (Ky. 2015)

FACTS: Two suspects were arrested in Glasgow for purchasing crack cocaine from Trigg. Glasgow officers obtained a search warrant for an address believed to be Trigg's home. Officers Burton, Houchens and others arrived to execute it, and Trigg opened the door. He remained there through the three hour search. The house was owned by his mother, but she was passed out on the couch and "surrounded by liquor bottles" during the search. In a suit coat pocket hanging in the bedroom closet,

[55] See, e.g., Payton v. Com., 327 S.W.3d 468 (Ky. 2010); Chavies v. Com., 354 S.W.3d 103 (Ky. 2011); Williams v. Com., 364 S.W.3d 65 (Ky. 2011).
[56] Maryland v. Pringle, 540 U.S. 366 (2003) (internal citations omitted); see also Com. v. Jones, 217 S.W.3d 190 (Ky. 2006).
[57] McCloud v. Com., 286 S.W.3d 780 (Ky 2009).

they found crack cocaine, cash and miscellaneous drug related paraphernalia; additional cash and plastic bags elsewhere in the room. Trigg was arrested.

At trial, testimony suggested that Trigg did not reside in the home, but elsewhere, and that he only stayed at his mother's home when "stormy weather threatened" because she was afraid of storms. (It was stormy that night.) During Officer Houchens' testimony, the prosecutor asked if Trigg had ever said that he didn't live at the residence and the officer indicated he had not. Officer Burton agreed that he had not denied living at the home either, but volunteered that Trigg had admitted the bedroom in question was his. This drew an objection, which was overruled, that the statement had not been previously disclosed to the prosecution.

Trigg was convicted of trafficking and appealed.

ISSUE: Must inculpatory statements be provided to the defense prior to trial?

HOLDING: Yes

DISCUSSION: Trigg argued that the "evidence should have been excluded from the trial because, in violation of RCr 7.24(1), the Commonwealth had failed to disclose the statement during pre-trial discovery." "RCr. 7.24(1) provides in pertinent part that prior to trial, 'the attorney for the Commonwealth shall disclose the substance, including, time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness . . . .'" The Commonwealth argued that the prosecutor didn't know about the statement, because the prosecutor hadn't "asked the police investigators how they had determined which bedroom was Appellant's, and thus never learned of Appellant's statement until its fortuitous revelation at trial."

However, the Court noted that:

> However, our case law is clear: the Commonwealth cannot claim ignorance in order to avoid an RCr 7.24(1) violation. We have held that when a testifying law enforcement officer knows of a significant statement that was made, that knowledge is properly imputed to the Commonwealth, regardless of whether the prosecuting attorney had actual knowledge of the statement.[58]

Further the Court noted, excluding the statement, of which the prosecution was unaware, simply puts the prosecution in the same place it was previously and "at worst, the prosecutor is consigned to presenting the evidence that he intended to present when the trial started." But, in opposite, "the prejudicial effect upon the defendant of a sudden, mid-trial revelation of what is tantamount to a confession is manifest." The Court looked to Chestnut v. Com., "[t]he Commonwealth's ability to withhold an incriminating oral statement through oversight, or otherwise, should not permit a surprise attack on an unsuspecting defense counsel's entire defense strategy. Such a result would run afoul of the clear intent of RCr 7.24(1)."[59]

The Court agreed that "RCr 7.24(1) entitled Appellant to know in advance of trial that the Commonwealth would present testimony attributing to him a self-incriminating statement. Without the fair notice required under RCr 7.24(1), the accused individual who is suddenly confronted with the claim that he made incriminating remarks must cobble together a make-shift response or allow the testimony to go unchallenged. Either way, Appellant's counsel was unfairly hindered in his ability to prepare and present a proper defense and to effectively challenge the accuracy of the testimony through cross-examination." In fact, that statement was the only direct evidence that he did, in fact, live there, as the remainder of the evidence presented indicated he did not. There was not even evidence that the coat would fit him, as it was not entered into evidence.

[58] Anderson v. Commonwealth, 864 S.W.2d 909 (Ky. 1993).
[59] 250 S.W.3d 288 (Ky. 2008).

The Court noted that "It was the Commonwealth's duty under RCr 7.24(1) to learn of Appellant's incriminating statement and to disclose the substance, time, place, and date of it to Appellant's counsel. The failure to perform this duty was a discovery violation." And, "when an undisclosed statement makes it doubtful that defense counsel would have proceeded in the same manner at trial, then reversal is required."

The Court also addressed other issues. The Court noted that officers were permitted to testify as to what he did not say – in effect remarking upon his silence. The Court noted that his "pre-arrest, pre-Miranda warning silence as substantive evidence of guilt was permissible because he never put officers on notice that, by remaining silent during the search, he was invoking his Fifth Amendment right." The Court noted however, that ""[w]hen incriminating statements are made in the presence of an accused under circumstances that would normally call for his denial of the statements, and it is clear that the accused understood the statements, yet did not contradict them, the statements are admissible as tacit, or adoptive admissions" – which the Court called an "adoptive admission."[60] To qualify as an adoptive admission through silence under KRE 801A(b)(2), the defendant's silence must be a response to "statements [of another person, the declarant] that would normally evoke denial by the party if untrue."[61]

> We explained in Buford*:*
> [S]everal conditions must be satisfied before a statement can be attributed to a party because of silence. A statement may not be admitted as an adoptive admission unless it is established that the party heard and understood the statement and remained silent. Additionally, a statement is not admissible if conditions that prevailed at the time of the statement deprived the party of freedom to act or speak with reference to it.[62]

In other words, "silence is admissible only in conjunction with the accusatory out-of-court statement, because it is only in the context provided by the out-of-court statement that any meaning can be ascribed to the silent response. Without the declarant's antecedent statement, the corresponding silence is devoid of any meaning at all. Silence derives its meaning and its evidentiary relevance only in context provided by the out-of- court statement that preceded it." The Court agreed it was improper to let the jury "infer culpability simply because" Trigg "did not protest the execution of a search warrant or disavow his interest in the searched premises." As such, the Court agreed that if retried, no mention of his remaining silent could be made.

Trigg's conviction was vacated.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Adams v. Com., 2015 WL 2266484 (Ky. App. 2015)

FACTS: Adams was visiting Richmond from Detroit. While in Kentucky, he intended to buy a car, so he had $2,500 in cash with him. He found a vehicle for sale from Samples and drove away, but returned when it overheated. Samples told Adams that he could fix the car if Adams bought the parts, and Adams accompanied King (who was driving a black Jeep) to a an auto parts store.

Det. Parker was on surveillance at a local motel. He spotted the black Jeep arrive and Adams get out and go to one of the hotel rooms briefly. He returned to the Jeep and it drove away. Det. Johnson observed a green minivan closely following the Jeep, and King, and the minivan driver, enter an apartment, with Adams staying in the Jeep. When they drove away, Johnson made a traffic stop and King had not put on his seatbelt. During the stop, he discovered King had outstanding warrants and he

[60] Marshall v. Com., 60 S.W.3d 513 (Ky. 2001),
[61] ROBERT G. LAWSON, THE KENTUCKY EVIDENCE LAW HANDBOOK § 8.20[3][b] at 597 (5th ed. 2013) (citing Com. v. Buford, 197 S.W.3d 66 (Ky. 2006)).
[62] Id.

was arrested. He gave consent for a search of the car, and a total of 32 pills (apparently Percocet) were found in several locations in the car.

Adams and King were both tried for trafficking. Adams appealed.

ISSUE: Must information that a co-defendant is an informant be allowed before the jury?

HOLDING: No

DISCUSSION: Among other issues, Adams argued that it was highly prejudicial to him that he was not permitted to introduce evidence that King (who was not charged at the scene, as Adams was) was going to serve as a police informant. As a result, he could not rebut the assertion that the pills found belonged to him. However, the Court noted, the jury knew that King was, eventually, also charged with trafficking and he was convicted.

The Court affirmed Adams' conviction.

TRIAL PROCEDURE / EVIDENCE – JURY DELIBERATIONS

Doneghy v. Com., 410 S.W.3d 95 (Ky. App. 2015)

FACTS: In April, 2010, Doneghy struck and killed Officer Bryan Durman (Lexington PD) while the officer was standing outside his vehicle on an investigation. He fled but was apprehended, but not without a fight. He was ultimately convicted of a variety of charged, including Manslaughter 2nd . He appealed.

ISSUE: Must a deliberating jury be supervised during an outside meal?

HOLDING: No (but generally they should be)

DISCUSSION: Among other procedural issues, Doneghy argues that the jury was improperly allowed to go to lunch unsupervised during deliberations. The Court noted that in Winstead v. Com., the Court had given the trial judge discretion in whether such a lapse requires a mistrial.[63] The jury had been admonished before being released to go to lunch and there was no indication of improper influence on any member of the jury.

The Court upheld Doneghy's conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR INCONSISTENT STATEMENTS

Nasir-Al-Din v. Com., 2015 WL 1581159 (Ky. 2015)

FACTS: During Nasir's trial for a shooting in Owensboro, a witness, Smith, testified in a way that differed from what the Commonwealth, which called him, expected. As such, the Commonwealth sought and received consent to treat him as a hostile witness. Smith was asked if he'd given a statement to the police and if that statement was different than the one he was giving. Smith stated he didn't remember, and when asked if hearing it would help refresh his recollection, he agreed. Over Nasir's objection, the statement was played, in which Smith identified Nasir as the shooter. He continued to maintain he didn't remember making the statement.

Nasir was convicted of assault and appealed.

ISSUE: May a witness's recollection be refreshed?

[63] See 327 S.W.3d 386 (Ky. 2010).

HOLDING: Yes

DISCUSSION: Nasir argued that the statement should not have been admitted. The Court noted that a foundation was properly laid, and that the witness agreed he recalled speaking to the police that day, just not specifically which officer or what he said. That laid the foundation for the requirements of KRE 613 to admit a prior inconsistent statement under KRE 801A(a)(1). (Since they were admitting it under KRE 612, requirements of that rule did not need to be met.) Further, "admission of a prior recorded statement is not error if the statement has been properly authenticated and the defendant had the opportunity to cross-examine the witness." Since that was the case, his conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – VIDEO

Short v. Com. , 2015 WL 3631671 (Ky. 2015)

FACTS: Warren County officers were informed of a fight at a motel. They headed in that direction, while requesting backup. Four officer canvassed the motel and the environs and failed to locate the fight. As they were conferring, a woman emerged, trailed by a "strong chemical odor from inside the room." Suspecting an active methamphetamine lab, they stopped and questioned her. As the officers approached the room, "Short emerged and immediately shut the door," claiming the odor was nail polish. He refused to consent to a search so the officers obtained a warrant.

With that warrant, they found a number of items connected to methamphetamine manufacturing. Short was charged with manufacturing and convicted. He then appealed.

ISSUE: Is a video permitted when it is not relevant to any fact at issue?

HOLDING: No

DISCUSSION: Short argued that it was improper to admit a video used in police training concerning the steps of methamphetamine manufacturing. The trial court, over objection, had ruled that it was a "helpful piece of demonstrative evidence to explain in more detail the process of manufacturing methamphetamine and the danger involved." Rather than playing the audio of the video, Det. Wright, a member of the local PD and regional drug task force, narrated it, "discussing and reading the captions that appeared at each step in the process." The lab depicted was "not representative of the lab" found in the motel room.

The Court agreed that the video was not, in fact, relevant to any material fact at issue, and there was no evidence as to the method Short actually used. The Court noted that Det. Wright's testimony more clearly accomplished the goals of explaining how Short made methamphetamine when he used photos taken of the motel room and the components found there. However, the Court agreed, the admission of the video was harmless and upheld his conviction.

Christian v. Com., 2015 WL 2445580 (Ky. App. 2015)

FACTS: The first of five controlled buys involving Christian took place on July 3 and 5, 2012, in Nicholasville. Per protocol, officers searched Taylor, the CI, prior to each buy, provided him with money and a recording device. Taylor was in their sight during the entire transaction and they retrieved the drugs and searched his car after each buy. Three more buys occurred, with the last on August 2. The same procedure was followed, and with only one except, officers had him in sight the entire time. Martin, Taylor's girlfriend, was also with him.

Christian was charged with trafficking. Prior to trial, Taylor died, and Christian argued for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May an officer authenticate a recording of events they watched?

HOLDING: Yes

DISCUSSION: First, Christian argued that since the officers were not "privy to the actions depicted in the recordings" and as such, they could not authenticate them. The Court looked to KRE 901 and agreed that "to clear the authentication threshold, the Commonwealth only needed to show that the recordings accurately reflected the events of each controlled buy." The testimony of a detective who watched nearly all of the transactions was sufficient.

Christian also argued that admission of the recordings violated his Sixth Amendment Confrontation rights – and that the recordings "are testimonial because they are submitted for the purpose of establishing or proving a fact." The court looked to Crawford v. Washington, and noted, first, that it only applies to testimonial hearsay. In Turner v. Com, the Court had addressed "Crawford's application to recordings supplied by a non-testifying confidential informant."[64] The Court in that case ruled that the recordings "served a valid, non-hearsay purpose and thus did not violate or implicate Crawford or the Confrontation Clause." The Court noted that it assumed (the recordings were not submitted as evidence) that the recordings "contain statements by both Taylor and Christian." Christian's own statements are admissible "as non-hearsay admissions by a party-opponent."[65] Taylor's statements were not offered to prove the truth of what Taylor was saying, but to "provide the factual landscape (context) for Christian's admissions and the transactions." Further, the actual events in the videos (minus the verbal statements) are not hearsay either, although in some cases nonverbal conduct can be considered as statements – when, for example, the individual points at someone else to identify them.

The Court agreed that the recordings were properly admitted.

TRIAL PROCEDURE / EVIDENCE – BOLSTERING

Propes v. Com., 2015 WL 1778198 **Ky. App. 2015**

FACTS: On October 28, 2011, Propes sold 80 hydrocodone pills to Bryant, a CI, in Casey County. At trial, Bryant testified that he learned "from a neighbor related to Propes that Propes was selling pills." Det. Allen (Casey County SD) later testified that he had "thoroughly searched Bryant and his vehicle both before and after the buy, provided $560.00 to Bryant with which to make the buy, and observed the transaction from a distance."

Propes was convicted and appealed.

ISSUE: Is witness bolstering permitted?

HOLDING: No

DISCUSSION: Among other procedural issues, Propes argued that "Det. Allen wrongfully bolstered Bryant's credibility and reliability by testifying he had worked with Bryant as a CI several times and the safeguards surrounding controlled buys had never indicated Bryant had done anything "inappropriate or illegal." Propes claims this as a violation of KRE 404(a) and 608 by "allowing Det. Allen —the Commonwealth's first witness—to bolster Bryant's credibility and reliability before it had been attacked—although defense counsel would ultimately pit Bryant against Propes and ask jurors to decide who was more believable." The court noted that the testimony came out of a line of questioning considering the use of Cis, including comments about "dishonest informants who tried to retain drugs for themselves after making a buy." The Court agreed that the detective's comments were not a "direct comment on Bryant's character."

[64] 248 S.W.3d 543 (Ky. 2008).

[65] KRE 801A(b)(1); Fisher v. Duckworth, 738 S.W.2d 810 (Ky. 1987). Williams v. Illinois, 132 S.Ct. 2221 (2012).

In addition, he argued that it was improper to allow Det. Allen to "interpret" the audio and video recordings because he did not personally observe the drug transaction and his testimony invaded the province of the jury."[66] However, all Det. Allen did was "generally describe[] what jurors were about to see and hear," which was consistent with prior case law. "At no time did Det. Allen "interpret" any inaudible portion of the tapes. Thereafter, the separate video and audio tapes were played. Det. Allen did not testify while the tapes were being played. Jurors were left to determine for themselves what they saw and heard."[67]

Propes' conviction was upheld, although the case was remanded for sentencing error.

CHILD PORNOGRAPHY

Griffith v. Com., 454 S.W.3d 315 (Ky. App. 2015)

FACTS: Griffith and Todd had a daughter, M.G., in 1999. The three moved in with Griffith's parents a few years later. Also in the household was Griffith's niece, born in 1992. In 2011, Todd and M.G. moved out, while Griffith remained with his parents. Todd asked to borrow Griffith's computer for M.G. to use and the computer was taken there. In July, 2011, M.G. told her mother that she'd had "sexual contact with Griffith." Det. South (Newport PD), investigated. Todd discovered a nude photo of the niece. A family member, Matthews, examined the computer and found additional photos and a "self-produced" video of the niece, nude, and in a sexual pose. Similar files were found on a thumb drive that the daughter had taken from Griffith's home.

Upon interview, "Griffith admitted to watching adult pornography, but denied viewing or downloading child pornography." He admitted that he had the video of the niece, which he claimed to have received from her former boyfriend, and that he'd retained them solely to show to the niece that her boyfriend "was no good." Officer Baker (OAG Cyber Crimes) examined the computer and confirmed the video and nine photos of "nude children engaged in sexual contact." At trial, for multiple counts of sexual performance by a minor and sexual abuse of M.G., the niece testified that she had made the video for her boyfriend but didn't provide it to Griffith. Griffith claimed to have deleted it and had no idea about the other images.

Griffith was convicted only for possession of the video (Possession of Matter Portraying a Sexual Performance by a Minor) and acquitted of all other charges. He appealed.

ISSUE: Is holding a video of child pornography, even if for "innocent" purposes, sufficient for a conviction?

HOLDING: Yes

DISCUSSION: Griffith argued that "there was no proof presented that he retained the video for his own prurient interest, or even retained it at all." He argued that he'd had the video only to show to niece and that he then deleted it. He further argued that "there was no evidence of child pornography being on the computer until it was in [Todd]'s hands." The Court noted that he had admitted that "he received the video and possessed it on his computer, albeit for the limited purpose of confronting Niece about the video." At the time, "he certainly was able to exercise dominion and control over it because, at that moment, he had the ability to save, copy, e-mail, print, or share the video," which satisfied the possession element.

The Court agreed with Griffith's argument that "KRS 531.335 is not designed to punish parents seeking to investigate and address illicit or otherwise inappropriate behavior by their children." Most importantly, that change in the statute, a defense, in effect, took place after Griffith was charged, and there was no indication it was intended to be applied retroactively. Further, he is neither the girl's parent or guardian

[66] Cruzick v. Com., 276 S.W.3d 260 (Ky. 2009).
[67] Gordon v. Com., 916 S.W.2d 176 (Ky. 1995).

(although he apparently considered himself such,) "nor is he a school official," as provided for in the statute.

Griffith's conviction was affirmed, although the case was remanded for sentencing errors.

EMPLOYMENT

Giberson v. City of Ludlow, 2015 WL 1880755 (Ky. App. 2015)

FACTS: "Giberson alleges that in 2009, a Ludlow resident (Jane Doe), informed him and Lieutenant Colonel Benny Johnson that she had been sexually abused by a former City Police Chief approximately twenty years prior, when she was a minor. In July 2010, Giberson learned an official report on the alleged abuse had not been completed and contacted the Kenton County's Attorney's office regarding the procedure for reporting the alleged sexual abuse." He followed their direction and "prepared a standard police report and a form, referred to as a JC3." For some reason, it was never delivered to CHFS, however. A few weeks later, he was "placed on administrative leave because of concerns regarding his mental health." He was ordered by the Chief to submit to a psychiatric exam and was found to be fit for duty. The day after that, however, he was suspended and terminated.

The charging document read as follows:

> Comes now the Chief of Police of Ludlow Police Department and hereby (proffers) charges against Police Officer William Giberson pursuant to KRS 15.520 and KRS 95.701 et.seq. based on the following violations of the Ludlow Police Department General Rules of Conduct, adopted by the Ludlow City Council pursuant to City of Ludlow, KY Ordinance 1987-3, and for violations of General Rules of Conduct 12.1 et seq. and 30.1 et seq. Please see a certified copy of Ordinance 1987-3 attached hereto and incorporated herein by reference as Exhibit "1". These charges are stated with specificity as follows:
>
> FACTS
> 1. On January 23, 2010, Officer Giberson had a complaint of being rude and unprofessional to the public on a call for service. Officers were ordered to make a report on this incident, however while Lieutenant Colonel (LTC) Johnson was gathering information on this incident Officer Giberson was disciplined for another incident and sent to Employer Assistance Program, (EAP) and this was set aside pending the outcome of the sessions with EAP. Please see attached call report and officers' reports to LTC Johnson regarding this incident as Exhibit "2" which is incorporated herein by reference. This conduct is in violation of Section 12.1.1 of the General Rules of Conduct and section 30.1 (A) (4) of the Ludlow Police Department's Rules and Regulations.
>
> 2. On May 8, 2010, Sgt. Beck gave Officer Giberson a counseling statement for his performance as it relates to working an Over-Time detail. Officer Giberson did not follow the instructions as set forth by his supervising officer. This conduct is in violation of sections 30.1 (A) (4) and of the Ludlow Police Department's Rules and Regulations. Please see the counseling statement attached hereto and incorporated herein by reference as Exhibit "3".
>
> 3. On June 12, 2010, Officer Giberson was working "TAP", a grant to patrol and arrest intoxicated drivers. However, during this grant detail, Officer Giberson along with Officer Eastham responded to Villa Hills, Kentucky to back up the Villa Hills Police regarding subjects running from the Villa Hills Police at the Clubhouse in Prospect Point. Officer Giberson while working this detail, is permitted only to aid officers or other departments in emergencies only. The situation in Villa Hills did not constitute an emergency so as to excuse or allow Officer Giberson to respond to that scene for assistance. This conduct is in violation of sections 30.1(A) (2) and of the Ludlow Police Department's Rules and Regulations.

4. On June 12, 2010, Officer Giberson was continuing to work the "TAP" patrol and upon his arrival on a scene of a stop made by Officer Eastham, located an 18 year old suspect who had been operating a motor vehicle. The driver was stopped by Officer Eastham who noticed a smell of intoxicants on the driver and turned the investigation over to Officer Giberson for TAP detail contacts. Officer Eastham informed Officer Giberson that the suspect had been driving and Officer Giberson in turn arrested the driver for Alcohol Intoxication, without having performed any field sobriety tests. The threshold of proof for driving under the influence was lesser than that of standard alcohol intoxication since the driver was under 21 years of age, and only required the demonstration of a blood-alcohol level of .02. The Alcohol Intoxication charge has a greater threshold of proof, yet Officer Giberson elected to pursue the Alcohol Intoxication charge. The suspect was also charged with operating his vehicle on a suspended operator's license. This is inefficient conduct and in violation of sections 30.1(A) (1), (2), and (4) of the Ludlow Police Department's Rules and Regulations. Please see reports from Officer Eastham regarding the incident attached hereto and incorporated herein by reference as Exhibit "4".

5. On July 13, 2010, the Kenton County Attorney's Office called the Ludlow Police Department about paperwork on one of Officer Gilberson's cases that is separate from any mentioned in these charges. Detective Hawks was advised by Clerk Bob Epperson, that the Kenton County Attorney Office is requesting a copy of the report on case # 0710LD038. This is a Domestic Violence Assault where the perpetrator of the domestic violence was arrested on 07/10/2010. Detective Hawks located the entry in the report book, (Case # 0710LD038-Report, Case# 0710LD039-JC3); however, there is no report or JC3 to be found. Detective Hawks placed a copy of both the request and citation on LTC Johnson's desk. This is inefficient conduct and is a violation of section 30.1 (D) (4) of the Ludlow Police Department's Rules and Regulations. Please see the report from Detective Hawks regarding this event attached hereto and incorporated herein by reference as Exhibit "5".

6. On or about July 29, 2010, it was discovered that Officer Giberson failed to properly produce an incident report and log items into evidence. Specifically, Officer Giberson had four (4) United States Postal Service money orders in the amount of $820 each for a total of $3,380.00 turned over into his possession as part of a fraud investigation. Officer Giberson neither made a report regarding this incident nor did he log the money orders into evidence. Please see the attached inventory log of Officer Giberson police cruiser attached hereto and incorporated herein by reference as Exhibit "6".

7. On or about July 29, 2010, it was discovered that Officer Giberson failed to log items of property seized from individuals into evidence or turn them over to the Kenton County Jail facility. These items include; a brown wallet containing a Bank of America MasterCard belonging to Joshua Huffman and multiple gift cards; a second brown wallet containing cash; and a small, black and white purse. This conduct is in violation of the Ludlow Police Department Rules and Regulations section 30.01 (D) (4) and (18). Please see the attached inventory log of Officer Giberson police cruiser attached hereto and incorporated herein by reference as Exhibit "6".

8. On or about July 21, 2010, Officer Giberson was one of three officers on duty as a "first responder" unit. At approximately 2:47 p.m. dispatch relayed a call of a burglary in progress in the 300 block of Stokesay Street in Ludlow. Officer Giberson never responded. Dispatch called for Officer Giberson on the radio as to his status when he did not respond to the crime scene. Officer Giberson did not respond and failed to notify dispatch or his supervisors of his unavailability to take calls. Officer Giberson finally responded to dispatch that he would be responding from Madison Avenue in Covington. It was later determined that Officer Giberson was training with the Covington Police Department. This was done without notice to his supervisors. The Ludlow Police Department, due to Giberson's inefficient conduct, was unaware that it would need to have someone cover Giberson's calls. Officer Giberson was out of the city of Ludlow and off his beat. This conduct is in violation of the Ludlow Police Department Rules and Regulations section 30.1(A)(2) and (D)(4). Please see the investigation report and dispatch log attached hereto and incorporated herein by reference as Exhibit "7".

9. Officer Giberson continues to bring the City of Ludlow Police Department in disrepute by his continued failure to conform to the rules, regulations, and policies of this Police Department. Even though Officer Giberson has received numerous reprimands regarding his conduct and failure to comply with said rules. Attached hereto and incorporated herein by reference as Exhibit "8" is a summary of the complaints and problems with Officer Giberson, some of which he was disciplined for and others for which he was not disciplined. For those he was disciplined for there are corresponding disciplinary reports.

As Chief of Police, I believe that Officer Giberson continues to demonstrate inefficiency, misconduct and insubordination in his performance as a City of Ludlow Police Officer. He has continuously violated the departmental rules and regulations and fails to follow the goals and objectives of the Ludlow Police Department. I have reviewed this documentation as well as Officer Giberson's history of behavior with the City of Ludlow Police Department. After careful review, I believe, as Chief of Police, that Officer Giberson will not change his course of conduct and will continue to bring this Police Department in disrepute.
WHEREFORE, I, Wayne Turner, as Chief of Police, will no longer accept the responsibility for the conduct and actions of Officer William Giberson as a Ludlow Police Officer, and request, on behalf of the Ludlow Police Department that the legislative body not only hear the above charges, but also consider Officer Giberson's past history as a member of this Police Department and terminate his employment with the City.

Over three hearings, Giberson was" represented by counsel and permitted to cross-examine witnesses, present witnesses and other evidence." A number of witnesses, including the chief, testified in detail. The chief agreed that "no charge against Giberson taken in isolation would warrant him to seek termination," but argued that that taken together, termination was warranted. When the chief was questioned about the sexual abuse case, the Chief "characterized Giberson's report as fabricated in part, specifically the date and time of the alleged sexual abuse and, therefore, it was not filed with the Cabinet for Health and Family Services." (The victim was not willing to cooperate and another officer testified that Giberson's account was not accurate.)

Giberson's termination was upheld. He filed an action alleging violations of KRS 61.101 (the whistleblower act) and wrongful termination. The Circuit Court affirmed his termination and Giberson appealed.

ISSUE: Does KRS 15.520 apply to internally generated complaints?

HOLDING: Yes

DISCUSSION: First, Giberson argued that KRS 15.520 was violated with the City arguing that "the statute is only applicable where a private citizen's complaint is made against an officer and not to situations, as here, where the disciplinary action is initiated by the chief of police based on intra-department charges." The Court acknowledged that was the position in a string of unpublished cases, but noted that in Pearce v. University of Louisville, by and through its Board of Trustees, it had "declared this Court strayed "down the wrong path."[68] The Court agreed KRS 15.520 "establishes a "baseline system for the investigation and hearing of complaints against police officers[.]" The Court concluded that "that as it is currently written, KRS 15.520 applies to disciplinary actions that originate from within a police department as well as to disciplinary actions initiated upon complaints from persons outside the police department."

The Court agreed that KRS 15.520 "specifically provides for judicial review of the City's decision." In the somewhat unique procedural posture of review described in Stallins v. City of Madisonville, the Court made clear that the role of the City Council in this instance is as an administrative body empowered to make two determinations: "first, whether the officer has violated the rules and regulations of the

[68] 448 S.W.3d 746 (Ky. 2014).

department and if so, second, it must exercise its discretion in imposing a penalty."[69] The circuit court is concerned only with the first inquiry leaving the punishment and discipline of a police officer to the City." In these cases, the Court "is limited to resolving whether the decision was arbitrary."

Giberson argued that while he was given the "basic rudiments of due process," the statute demanded much more. First, he argued, the hearing could not consider any conduct outside of the 60 day window of the statute. With "no published precedent," available, the Court looked to Hawkins v. City of Lawrenceburg and the Court rejected the argument that administrative leave with pay unrelated to disciplinary matters triggers the sixty-day requirement." The Court agreed that was proper.[70] Although Giberson argued that "a department could indefinitely take such action without affording an officer due process rights," but the Court noted, "While theoretically possible, such a scenario is unlikely in view of the already strained financial condition of local police departments." The Court agreed that "the formal charge and the officer's suspension trigger the statute." All three of his hearings were within the 60 day window.

Giberson also argued that he was "not provided with exculpatory evidence prior to the hearing" – specifically "commendations in his personnel file." The Court noted that "past praise within the department demonstrates only that Giberson performed his duties admirably at times but does not rebut the specific allegations of misconduct alleged in the charging document. While an officer's commendations might persuade a legislative body to impose a penalty other than termination, it is not evidence that the City is required to produce at the hearing. Giberson had ample opportunity before the hearing and over the course of the three months the hearings were held to gather and present any evidence he believed beneficial."

Further, although other officers had been the source of several of the complaints in the charging document, the Court agreed it was not essential that they be called to testify – only Chief Turner, who signed the document, was required. Further, hearsay evidence can be admitted in an administrative hearing, ""if it is the type of evidence that reasonable and prudent persons would rely on in their daily affairs[.]" KRS 13B.090(1)." The Court further agreed that the charging document provided sufficient detailed information to notify him of the charges against him. Finally, he argued that his termination was not in accordance with KRS 95.765, the Court agreed that its mandates were sufficiently covered _ must be provided notice of the charges against him, afforded a trial, and have the right to subpoena witnesses on his behalf." By the compliance with 15.520. Any whistleblower claim was irrelevant "to whether there was substantial evidence that he violated the police department's rules and regulations."

The Court concluded:

> The rules of conduct applicable to the City's police officers are necessary to the professional work of police officers and their interaction with the public. The rules and regulations are written with sufficient clarity so that people of common - intelligence can readily understand the conduct prohibited and need not guess at its meaning.[71]

The Decision of the Kenton Circuit Court is affirmed.

CIVIL LITIGATION

Louisville / Jefferson County Metro Government v. Whitlock, 2015 WL 2445111 (Ky App. 2015)

FACTS: On November 2, 2011, Ortiz was stopped at a Louisville Wal-Mart for shoplifting. She surrendered her bags to the loss prevention agent and left the store, getting into her vehicle. Whitlock was a Jefferson County Constable and happened to be on the premises. Wal-mart contacted him on his personal cell phone, requesting help. An agent of Wal-mart rode with Whitlock in his vehicle through the

[69] 707 S.W.2d 349 (Ky.App. 1986).
[70] 2002-CA-001706-MR, 2003 WL 22111102 (Ky.App. 2003),
[71] Connally v. General Construction Co., 269 U.S. 385 (1926)

lot, towards Ortiz's car. "When Ortiz attempted to leave the parking lot, Whitlock exited his vehicle, ran toward Ortiz's vehicle and shot her in the arm and face." Ultimately Whitlock took guilty pleas to felonies related to the case, although the cases would be "conditionally discharged upon successful completion of one year in the pretrial diversion program." Ortiz filed suit against Walmart and Whitlock, "in his individual and official capacity," for battery and related conduct.

Whitlock filed timely notice to Metro Louisville, asserting that Metro has a duty to defend him under the CALGA. Metro denied him and Whitlock filed a complaint. Metro again denied any duty. Wal-mart intervened, disputing "Metro's assertion that Whitlock was acting as Wal-Mart's agent." Ultimately, the Jefferson Circuit Court ordered that Metro had a duty to defend, although Metro may possibly recover costs for the defense at a later time. Metro appealed.

ISSUE: Does a county have a duty to represent its elected officials in lawsuits related to their job?

HOLDING: Yes

DISCUSSION: The Court looked to the statute in question, KRS 65.200 et seq. The Court noted that since this case involves the interpretation and application of a statute, it was appropriate to review, and that "When interpreting a statute "[t]he cardinal rule …. is to ascertain and give effect to the intent of the legislature."[72]

Other rules of construction include the following:

> (1) legislative intent is to be determined by first looking at the statutory language giving the words their plain and ordinary meaning; (2) the statute must be read as a whole; (3) if a statute is unambiguous, extrinsic evidence of legislative intent and public policy is not considered; (4) a statute will not be construed to reach a manifestly unjust result; and (5) statutes are to be liberally construed to promote its purpose and effectuate the legislative intent.[73]

KRS 65.200 et seq. mandates that employees, which include elected and appointed officers of local governments, shall be defended by the local government for actions in which they are acting within the scope of their employment, their "public duties."

The Court noted that Whitlock, as an elected official of Jefferson County, qualified as an employee. Despite Metro's arguments as to why it should not be required to defend Whitlock, the Court looked to Whitlock's argument that Metro's duty to defend could be analogized to an insurance company's duty to defend its own insured. The Court agreed that "the duty to defend arises if the complaint's allegations may be reasonably construed to allege that the employee might have been acting within the scope of employment when the act or omission giving rise to the action occurred. Once triggered, the duty to defend continues until it is shown that the employee was not acting within the scope of his employment." The Court noted that the statute did permit Metro to attempt to recover costs, if the facts warranted at a later date.

With respect to Metro's argument that Whitlock was, in fact, acting as an agent of Wal-mart, and in fact, did occasionally work there as paid security, the Court agreed that it was a question that could be addressed. However, his identification that he was acting as a constable and acknowledgement by Metro that he was sued in his official capacity as such, was enough for the Court, at this stage, to affirm that Whitlock was entitled to a defense by Metro Louisville.

Mucker v. Brown, 462 S.W.3d 719 (Ky. App. 2015)

FACTS: Mucker was the "plant operator" for a public elementary school in Jefferson County. She was responsible for keeping the sidewalks clear of ice and snow. On February 1, 2010, she arrived at

[72] Kentucky Ins. Guar. Ass'n v. Jeffers ex rel. Jeffers, 13 S.W.3d 606 (Ky. 2000).
[73] Richardson v. Louisville/Jefferson County Metro Government, 260 S.W.3d 777 (Ky. 2008).

the school at 6 a.m., and found that the area was ice covered. She began to attend to duties within the school before treating the walks. Brown, an employee, arrived prior to 7 a.m. and slipped and fell on a walkway outside one of the secondary entrances. Another employee, Arnold, had realized that the sidewalks had not been cleared and had went to find Mucker, because a student had slipped, but Brown fell in the interim. She filed suit for her injuries against Mucker. The trial court denied Mucker's motion for summary judgment and she appealed.

ISSUE: Is a decision of whether a task is ministerial for the jury?

HOLDING: Yes

DISCUSSION: Mucker argued that she was entitled to qualified official immunity for her actions. The Court agreed that school boards and school employees are agents of the state and "enjoy government immunity."[74] Employees who are sued for negligence in their individual capacities may have qualified official immunity, as well.[75]

The Court acknowledged the "repeatedly problematic" issue of qualified official immunity.[76] The Court noted that "public officers and employees are shielded from liability for the negligent performance of discretionary acts in good faith and within the scope of their authority." However, the negligent performance or failure to perform a ministerial duty, does not convey the shield of qualified official immunity. "While the rule appears straightforward, the distinction between a discretionary act and a ministerial act is often blurred."

The Court noted that a "discretionary act involves the exercise of discretion and judgement or personal deliberation." However, a "ministerial act is one that is 'appealed, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.'" Drawing the line between the two is difficult, however and "continues to perplex even the most learned jurists." The Court looked to Marson, another school case, and affirmed that "discretionary acts are those involving quasi-judicial or policy-making decisions."[77] Mucker agreed that snow and ice removal was one of her job duties and that both were present on the day in questions. She also knew that students and teachers would be arriving soon and would use that secondary entrance, and that she had a "specific duty to clear the sidewalks" prior to their arrival. The Court agreed that while she had some discretion as to how to perform her varied duties, she had a ministerial duty to remove all the snow and ice in a timely manner. That was the "act" she was required to perform, and evaluating whether she had done that task properly was a question for the jury. Because the Court agreed the basic act was ministerial, immunity could not be given. The Court agreed that the elements of negligence must be proven, but agreed that qualified immunity was not appropriate, and upheld the decision of the trial court.

Luckett v. Murrell, 2015 WL 3826157 (Ky. App. 2015)

FACTS: On March 16, 2015, Officer Luckett (Louisville Metro PD) spotted Murrell in the street. He approached and discovered that he was intoxicated. (Murrell later stated that he thought the officer, who was apparently in plainclothes, was trying to buy drugs. The officer stated that he had his K-9, Willie, with him at the time.) Officer Luckette could see that Murrell had several potentially dangerous items with him, such as a shovel, a pipe, a screwdriver, a broom and a knife, and that he saw a bulge that he thought might be a firearm. Murrell did not cooperate with a frisk, and they "engaged in a physical altercation" that only ended when Willie attacked Murrell, who was then subdued by Officer Luckett.

Murrell was charged with Assault 3rd, AI, Wanton Endangerment and Resisting. Murrell took a plea agreement that included mental health diversion treatment. He then sued Officer Luckett and Metro

[74] James v. Wilson, 95 S.W. 3d 875 (Ky. App. 2002).
[75] Autry v. Western Kentucky University, 219 S.W.3d 713 (Ky. 2007).
[76] Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).
[77]

Louisville. Metro was dismissed on summary judgement, but the Court denied Officer Luckett relief, finding the officer to have taken discretionary actions in bad faith. Officer Luckett appealed.

ISSUE: Is the deployment of a K-9 a discretionary act?

HOLDING: Yes

DISCUSSION: The Court looked to the issue of immunity and discretionary acts, for which public officials may invoke immunity. The trial court had "determined that the deployment of the canine was a discretionary function by Officer Luckette." The Court agreed that there is a distinction between discretionary and ministerial acts" and that it had "held that the wrongful performance of a ministerial acts can subject the officer or employee to liability for damages."[78] The Court acknowledged that whether a particular act is discretionary or ministerial depends upon the facts of each case.[79]

The Court looked to LMPD's SOP on the use of a K-9, and ruled that there was insufficient evidence that the officer's use of Willie was done improperly or maliciously. The court reversed the trial court's decision and remained the case for an order of summary judgement on Luckett's behalf.

JURISDICTION

Crawford v. Com., 2015 WL 1778069 (Ky. App., 2015)

FACTS: On the day in question, Investigator Bell, (Attorney General's Office) along with Investigators Reed and Baker, and the Frankfort PD, executed a search warrant after tracking illicit files involving pornography to Crawford's apartment in Frankfort. They found "electronic media" that contained a vast amount of videos and images of minors involved in sexual activities. Crawford was cited on multiples charges. He requested suppression, which was denied. He then entered into a conditional guilty plea and appealed.

ISSUE: Does the OAG have the authority to initiate investigations?

HOLDING: Yes

DISCUSSION: Crawford argued that the OAG lacked jurisdiction to initiate investigations. The Court looked to the recently decided Johnson v. Com., which it held to be dispositive, and agreed that under KRS 15.020, the OAG has the ability to commence any actions in which the Commonwealth has an interest, and the that the agency is not required to wait for an invitation by local law enforcement. The Court noted that KRS 500.120 specifically grants the OAG "subpoena power 'in any investigation' involving the use of the internet in the exploitation of children." The Court agreed that any challenge to whether the OAG could actually prosecute such crimes had not been argued and as such, could not be addressed.

Crawford's plea was upheld.

EXTRADITION

Elery v. Com., 2015 WL 3533019 (Ky. App. 2015)

FACTS: Elery and McDonald shared an apartment in Jefferson County. On February 19, 2008, they got into an argument which continued into the next day. Elery later claimed that McDonald threatened him with a knife but he did not take it seriously. The fight escalated, however, and Elery struck McDonald in the head with a hammer, and then stabbed and choked her, ultimately to death. He left the apartment and proceeded to Harrison County, Indiana, where he was found to be drunk. He

[78] Kea-Ham Contracting, Inc. v. Floyd County Dev. Auth., 37 S.W.3d 703 (Ky. 2000).
[79] See Caneyville Volunteer Fire Dept. v. Green's Motorcycle Salvage, Inc., 286 S.W.3d 790 (Ky. 2009).

asked that the Sheriff be contacted. He spoke to law enforcement, including a Louisville detective who had arrived, and confessed to the murder. He was transported back to Louisville.

He was convicted of murder and related offenses. He then appealed.

ISSUE: Is a voluntary return to the demanding state subject to extradition?

HOLDING: No

DISCUSSION: Elery argued that he was "illegally arrested in Indiana by Louisville police and should have been extradited from Indiana instead." The Court noted he had previously moved to exclude his statement on the basis that he was too intoxicated to voluntarily confess, and also because he was questioned by Harrison County prior to being arrested for public intoxication. The Court noted that his conversations before arrest were non-custodial and that we was properly given Miranda after that. The Court noted that he voluntarily agreed to return to Louisville, after been told that they could not force him to go with them at that time. He was not in custody when he "showed them various locations where evidence could be found." Although he might later have regretted his confession and cooperation, "no illegality occurred."

The Court affirmed his conviction.

SIXTH CIRCUIT

FEDERAL LAW

U.S. v. Eaton, 784 F.3d 298 (6th Cir. 2015)

FACTS: On February 24, 2010, Sheriff Eaton (Barren County) and several deputies were involved in the arrest of Stinnett, "following an hour-long car chase that involved three different law enforcement agencies." At the end of the chase, Stinnett crashed his van into a Glasgow church and fled on foot, into what turned out to be a blind alley. Eaton reached him first. Despite Stinnett's assertion later, that he "raised his hands behind his head and tried to get on his knees in an effort to surrender," Eaton struck him in the head with his baton. Stinnett fell to the ground but Eaton continued to hit him.

Deputies Guffey, Bennett and Minor came into the alley. Stinnett was cuffed, but Eaton and the other three deputies "continued to strike him, punching him in the head and 'all over.'" He stated he'd kicked Eaton in self-defense and that Eaton then struck him on the back of the legs with the baton. Deputy Minor testified that he and Bennett had arrived as handcuffs were being placed, and admitted he'd kicked Stinnett twice, and that Bennett had actually broken his hand punching Stinnett in the head 5-10 times. He switched to a baton at that point and continued to strike. Minor was pulled to his feet and walked toward the road. During that time, Special Deputy White struck him in the head. After he was searched and a small pocket-knife found in his pocket, they "continued walking." At that point, Eaton, "struck Stinnett in the groin, causing Stinnett to lean over in pain."[80] Minor transported Stinnett to the hospital.

Three teenagers witnessed the altercation from a nearby window; two of them reported what had happened to their father. It was reported to the Glasgow PD, which referred it to the FBI. Agent Brown interviewed Stinnett at the Barren County Jail. On March 4, he visited Sheriff Eaton "to inform him of the investigation and request evidence related to the arrest." He was surprised to learn that no use-of-force reports had been completed, because Eaton did not require them – believing that "the more reports you write, the more you could get hemmed up." Brown requested reports. Later, Deputies Minor and Runyon (who had arrived later), testified that Eaton had instructed them to "write false reports regarding the incident." (Runyon and Eaton was longtime friends and Runyon was being "groomed" to be the next Sheriff.) Specifically, he told Runyon to state he'd seen a knife at the arrest scene but Runyon resisted,

[80] This was apparently photographed, but the photo was deleted at Eaton's command.

saying he wasn't even familiar with the scene. Eaton took him to the scene and instructed "Runyon on where he should say the knife was located." He was "nauseated" by the demand but was "afraid that he would lose his job if he did not comply with the request." He wrote a report, which Eaton approved, and it was sent to the FBI. Several meetings were held in subsequent months and Runyon gave false testimony before a grand jury in February, 2011. He did, however, testify that "he was not present when the knife was found." Following the indictments, "he was isolated in the department, excluded from operations and denied opportunities to work." He testified that "no one spoke to him for months."

Deputy Minor also received the same request to write a false report, and was directed as to what to write by Eaton. Once written, he was commanded to add additional details, which he did. He testified that some of the information in the report was false, but that "he was afraid of losing his job if he refused the orders." He testified to the false information to Agent Brown and "in three different state court proceedings."

Eaton was convicted of two counts of witness tampering – 18 U.S.C. §1512(b)(3). He appealed.

ISSUE: Is it federal witness tampering to cause false police reports to be made?

HOLDING: Yes

DISCUSSION: The elements of the charge state that "whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so … with intent to … hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense" is guilty of the crime. The Court agreed that Eaton's attempt (and success) to "procure false reports" from the deputies, from his "position of authority," was sufficient – and that they were given no choice under the threat of firing. (Runyon subsequently did retire.) Eaton argued that the jury could not give credit to two "admitted perjurers," and certainly, "the fact that Runyon and Minor acknowledged perjuring themselves at [Eaton's] request can hardly be said to weigh objectively in [his] favor." And, what Stinnett did during the fight was immaterial as the "federal investigation was not limited to allegations of excessive force after Stinnett was taken into custody," but included the entire event. The testimony involved concerned "the incident or occurrence in connection with which the crime may have occurred."

The court agreed that the conviction was sustained.

SEARCH & SEIZURE – CELL PHONE

U.S. v. Lewis, 2015 WL 3756497 (6th Cir. 2015)

FACTS: In August, 2011, Clemons was arrested by Lexington officers for distributing oxycodone. He agreed to cooperate with further investigations and officers used his cell phone to text his suppliers (Nicholson and Weisbrodt) to obtain more pills. They agreed to meet him and they too were apprehended with several hundred oxycodone. They also agreed to cooperate "in an effort to snare *their* supplier," Lewis. They shared some text communications they'd had with him. Because Lewis would be waiting for them to return with the money for the pills, the officers confiscated the cell phones and took them back to the motel where they were registered. There, Det. Curtsinger sent him a message that the deal had been completed and that they had the money. Lewis said he'd be there in minutes. Nicholson told the detective what type of car Lewis might be driving. They watched as a vehicle parked beside the couple's vehicle, outside, which at that point, was the only passenger car in the lot. When Lewis got out, Nicholson confirmed his identity. Lewis knocked and was promptly arrested. He was searched and an empty pill bottle, with a hydrocodone label – he'd received the prescription for 140 pills less than a week before – was found on his person. They also seized several cell phones, one that had the texts sent from Nicholson's phone and a large amount of cash, but no pills. The passenger in the vehicle was also arrested.

Det. Ford saw, inside the vehicle, a disassembled cell phone, a hotel room key card and an ATM deposit slip. Ford was instructed to go to the motel indicated by the key card and see if Lewis and Slaton (the female passenger) had a room there, and if so, to secure the room pending a warrant. He confirmed it with the motel and Ford went to the room and knocked. When he received no answer, he entered with the key card to secure it, finding it empty. He then waited while a search warrant was obtained. (A motel witness later stated, however, that while they were waiting, the officers did search and that the officers were wearing blue latex gloves." During the subsequent warrant search, a number of pills, cash and other evidence was found.

Lewis was charged with a variety of drug related offenses. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is observable illegal activity necessary for an arrest?

HOLDING: No

DISCUSSION: Lewis argued first that his arrest lacked probable cause and thus, everything that flowed from his arrest must be suppressed. The Court noted that although it was true Lewis was not engaged in any "observable illegal activity" at the time, nor in possession of any contraband, that there was "significant and sufficient corroboration of Nicholson's information" that indicated his involvement in criminal activity. The cell phone activity "corroborated the supplier-seller relationship between the two individuals," and he showed up in a vehicle and with a companion, as described by the informant. That was sufficient to support the arrest.

With respect to accessing data on his cell phone, which was then used in the search warrant application, the Court looked to Riley v. California.[81] The Court agreed that the information shared in the warrant was if anything, harmless error, and even if removed from the warrant, sufficient information remained, in particular, that the same message were reflected on Nicholson's phone. With respect to the vehicle, in which Lewis was the passenger, The Court agreed it was properly done under the automobile exception.[82] There was more than enough evidence that the vehicle would contain contraband

Finally, with respect to the hotel room, The Court agreed that Lewis was entitled to an expectation of privacy in the room. Although the government argued the need for a protective sweep, the Court agreed that there was no need to even consider that issue. Even if everything was done as Lewis alleged, "it cannot be disputed seriously that the same incriminating evidence would have been found after the warrant was issued and a full-scale search" occurred. Nothing that Ford allegedly did prejudiced the contraband later found. Even excluding the one mention in the affidavit of something seen in plain view upon entry, there was "more than sufficient evidence" for probable cause

Finally, Lewis argued the affidavit was flawed and lacking in some details, but the Court noted that all that is required of an affidavit to be "considered sufficient if it establishes probable cause to believe that the evidence … would be found in the place to be searched."[83] It isn't required to be absolute proof, just probable cause. Summarizing the text messages, for example, was sufficient, it was unnecessary to relate the entire text of the messages, as Lewis argued. The affidavit sufficiently linked the crime to the motel room, as well.

The Court affirmed Lewis's plea.

[81] 134 S.Ct. 2473 (2014).
[82] U.S. v. Johnson, 707 F.3d 655 (6th Cir.)
[83] U.S. v. Lattner, 385 F.3d 947 (6th Cir. 2004)

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Zuniga, 2015 WL 3462868 (6th Cir. 2015)

FACTS: Around July 2, 2013, a FBI task force in Memphis intercepted phone calls that indicated that a local member of the conspiracy was going to receive a large quantity of cocaine. A truck was connected to the individual (Lopez-Acuna). The FBI began surveillance on the home connected to the individual and they found that vehicle in the backyard. Intercepted calls indicated that Lopez-Acuna and his crew were loading the vehicle for a trip to Texas. Officer Bartlett contacted Trooper Behnke (Arkansas State Police) about the pending trip, explaining that the truck "would likely be carrying either money or narcotics." (This was a process they'd followed before.) Trooper Behnke was to "develop his own probable cause for the traffic stop" to avoid compromising the investigation.

At 3 a.m., the vehicle left Memphis, with Zuniga as the driver. It was tailed by two FBI vehicles, with Bartlett in the second vehicle. Bartlett communicated the truck information to Trooper Behnke and a meet-up point was established. Behnke was accompanied by Major, his narcotics detection dog. The trooper spotted the truck about 5 a.m. and saw that the vehicle was straddling the middle line and then crossing the fog line. He made the stop, although Zuniga delayed stopping for a short distance. At the subsequent suppression hearing, however, Behnke incorrectly identified the statutes he believed gave him cause to make the stop.

At the stop, the trooper stated, Zuniga was "shaking so bad" he though the driver was going to drop his documents. He eventually handed over a Mexican OL with what turned out to be a false name. He admitted he was in the country illegally. When Zuniga got out, as requested, he "immediately put his hands behind his back and turned around in an arrest position." The trooper, instead, had Zuniga turn back around to face him and started questioning; Zuniga gave inconsistent answers." The trooper also noted that the tools visible in the truck were not consistent with the type of work Zuniga stated he was engaged in performing. When asked about "large sums of money, drugs, or dead bodies in the truck," Zuniga glanced back and responded in the negative. He gave consent to a search. (Zuniga later stated his English was not good, but the trooper stated that "Zuniga appeared to understand their conversations and never said he did not understand any of Behnke's questions.") Major walked around the truck and gave a "profound alert" – around the gas tank - and tried to get into the truck bed. The trooper searched around an exterior fuel tank mounted in the truck bed and was able to determine, using a density meter, that there was something solid inside the tank. Ultimately a package was located inside the tank, which contained over $200K in cash. Zuniga was initially released but subsequently indicted, along with 15 others, in a drug trafficking conspiracy.

Zuniga moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Is the motive for completing a minor traffic stop relevant?

HOLDING: No

DISCUSSION: The Court noted that the "traffic stop here was justified at its inception." The trooper clearly identified two separate legitimate completed offenses that he witnessed were committed. The Court agreed that the trooper's "subjective intent or hope to uncover unrelated criminal conduct is irrelevant."[84] The Court agreed that despite the trooper being unable to correctly identify the observed offenses (for which he apparently did not cite Zuniga), his testimony was credible. His questions were, as well, appropriate as he had reasonable suspicion that Zuniga was involved in drug trafficking, and that was exacerbated by Zuniga's behavior and inconsistent responses to the questioning.[85]

[84] U.S. v. Everett, 601 F. 3d 484 (6th Cir. 2010).
[85] U.S. v. Stepp, 680 F.3d 651 (6th Cir. 2012).

Zuniga also argued that his consent was invalid because "he did not understand English." The trooper noted that Zuniga had responded appropriately to his questions about travel and his work, and that he had no reason to suspect Zuniga was lacking proficiency in English and could give a valid consent. Finally, even without the consent, the dog sniff was legal and provided probable cause for the subsequent search anyway.

The denial of the motion was upheld.

INTERROGATION

U.S. v. Ashmore, 2015 WL 1963587 (6th Cir. 2015)

FACTS: On October 7, 2011, a Kingsport (TN) PD officer responded to a welfare check at a local motel. The person was "reportedly passed out inside of a vehicle." The officer found Ashmore asleep. When he roused the man (Ashmore), he saw that Ashmore's pupils were constricted. He performed several FSTs, apparently unsuccessfully. He was searched; crack cocaine, drug paraphernalia and cash was found. More drug paraphernalia and two firearms were found in a locked container to which Ashmore had the key. Although state charges were placed, they were eventually dismissed because of federal charges.

As a result of the evidence, a federal warrant was to be served on Ashmore. Because of his prior violent history, a federal (ATF) and state contingent, including the KPD SWAT team, were tasked to make the arrest. Using a CI, they lured him to a location, where he was located with a female, Hutchins. He complied with orders to get out and was arrested. Agent Jenkins asked Ashmore if he had any weapons on his person or the vehicle and whether his prints would be found on them. He agreed that a revolver belonging to his wife "possibly" or "probably" would be found in the car. It was stipulated that Agent Jenkins had not given Ashmore Miranda warnings. Officer McQueen (KPD) then obtained consent for a vehicle search.

Ashmore was escorted to a cruiser and advised by Agent Jenkins of his Miranda rights. The agent asked Ashmore if he was a convicted felon and whether he knew he could not lawfully possess firearms. He replied in the affirmative to both questions. He admitted to smoking crack cocaine daily and taking pain pills. Officers located a weapon under the front seat, where it would have been more accessible to the passenger (Ashmore) than the driver. Ashmore stated it belonged to his wife. Additional drugs and paraphernalia were found.

Ashmore was indicted for possession of the firearm as a convicted felon, one for the weapon found initially and one for the weapon found at his arrest. He moved for suppression and was denied. Although the Commonwealth argued the Quarles "public safety" exception, the Court disagreed, but upheld the admission of the gun because the vehicle could have been lawfully searched anyway and the firearm would have been inevitably discovered.[86] The Court denied the admission of his statement about the weapon, however. The Government requested clarification, and the court agreed that his statement admitting to the weapon, after being given Miranda was admissible. This was not a situation of a follow-up incriminating statement "inexorably flowed from the earlier statement." It was a logical question to ask, even if the first question had never been asked, it was "was independent of, and legally unrelated to, Jenkins' first question'" to Ashmore. It was, therefore, purged of any taint.[87] At trial, Jenkins testified that Ashmore had "volunteered" the caliber of the revolver in the vehicle.

Ashmore was acquitted of having the gun on the first date, but convicted of the second. Ashmore appealed.

[86] U.S. v. Williams, 483 F.3d 425 (6th Cir. 2007)).
[87] Wong Sun v. U.S., 371 U.S. 471 (1963).

ISSUE: Is the question before Miranda technique proper?

HOLDING: No

DISCUSSION: The Court noted that one of the statements that Jenkins testified about as being made after Ashmore received Miranda had previously been the subject of testimony that it occurred BEFORE he received Miranda. In addition, "it may or may not be consistent with the version of the facts Agent Jenkins has presented elsewhere." In fact, both sides were relying on the same documents to support their conflicting positions – "Agent Jenkins' contemporaneous notes and grand jury testimony. Ashmore claimed that any statement he made about the caliber was pre-Miranda and thus excluded. The Court noted that "Agent Jenkins' notes and grand jury testimony exhibit a level of specificity that is not apparent in his suppression hearing testimony or his trial testimony." However, he had been provided with the notes prior to trial and as such, could not claim any "surprise." Because it was not clear when the statement was given, and because he did not object when it was initially introduced, the Court agreed it was not improper to admit it.

Further, the Court agreed that KPD was familiar with Ashmore and "believed him to be armed and dangerous" and as such, it was proper to use extreme care to take him into custody. Ashmore was questioned about the weapon, then given Miranda, and then questioned more extensively. The Court looked to Oregon v. Elstad[88], and Missouri v. Seibert[89] and noted that ""absent deliberately coercive or improper tactics in obtaining the initial statement, the mere fact that a suspect has made an unwarned admission does not warrant a presumption of compulsion." For admitting the statement ""[t]he threshold issue when interrogators question first and warn later is . . . whether it would be reasonable to find that in these circumstances the warnings could function 'effectively' as Miranda requires." The Court looked to four factors: "(1) the completeness and detail involved in the first interrogation; (2) the overlapping content of the pre- and post-Miranda statements; (3) the timing and setting of the interrogations; (4) the continuity of police personnel during the two interrogations; and (5) the degree to which the interrogator's questions treated the second round as continuous with the first." Since the trial court did not hold a specific evidentiary process to determine whether it should be admitted, the court agreed that "all of the factors suggest that Agent Jenkins' question-first, Mirandize-later tactic requires suppression of the post-Miranda admission."[90]

As to the first factor, although the questioning was not as detailed as in Seibert, Agent Jenkins asked pre-Miranda the one compound question relevant to a felon-in-possession charge: is there a gun in the car and are your fingerprints on it? The second, third, and fourth factors favor suppression because the pre- and post-Miranda questioning was materially the same; the second interrogation followed shortly after the first; the setting of both interrogations was the same; and Agent Jenkins conducted the questioning both times. Finally, under the fifth factor, Agent Jenkins picked his line of questioning up post-Miranda right where he left off pre-Miranda—he wanted to know what Ashmore knew about the gun that, by that time, had been found. All of this suggests that "the Miranda warnings did not 'effectively advise [Ashmore] that he had a real choice about giving an admissible statement' because the unwarned and warned interrogations blended into one 'continuum.'"[91]

The Court agreed that:

> Here, prior to the arrest, Agent Jenkins knew that Ashmore was recently found in possession of firearms. He knew Ashmore's criminal history, which indicated he was a felon. And he knew that Ashmore was sitting in the passenger seat of the car, suggesting that the car was not his. With this knowledge, Agent Jenkins began questioning Ashmore about the presence of weapons in the car and whether his fingerprints would be on any weapons found— just seconds after Ashmore was unexpectedly surrounded by between 10 to 20 armed law enforcement agents, arrested,

[88] 470 U.S. 298 (1985).
[89] 542 U.S. 600 (2004).
[90] Pacheco-Lopez, 531 F.3d 420 (6th Cir. 2008).
[91] Bobby v. Dixon, 132 S. Ct. 26 (2011)

> taken to the ground, and handcuffed. Agent Jenkins has admitted that his inquiry about fingerprints was a "trick" question because no fingerprints had been discovered on the two weapons the KPD officers found on October 7, 2011. Questioning Ashmore about the weapon at this time was unnecessary because, as the district court properly found, Ashmore was already handcuffed, so there was no public safety rationale for the pre-Miranda interrogation.

The Court noted that the government had "identified no need to continue the questioning at the scene of the arrest, just minutes after the pre-Miranda interrogation, rather than at the police station." The "environment and manner" of the questioning "suggests that the initial admission was obtained through coercion or improper tactics."

> "When a prior statement is actually coerced, the time that passes between confessions, the change in place of interrogations, and the change in identity of the interrogators all bear on whether that coercion has carried over into the second confession." Id. at 310. Here, all three of these factors suggest that the coercion carried over: very little time passed between the first confession and second; Ashmore remained in essentially the same place throughout both interrogations; and Agent Jenkins questioned Ashmore both times about the weapon in the car. Under this scenario, the second confession was not "sufficiently an act of free will to purge the primary taint."[92]

The Court reversed the denial of Ashmore's motion to suppress.

U.S. v. Hernandez, 2015 WL 1963572 (6th Cir. 2015)

FACTS: On March 12, 2013, the FBI executed a warrant and arrested Hernandez at a hotel in Tennessee. Drugs were found, but Agent Thomas testified later that he did not believe Hernandez was under the influence at the time. He was "coherent enough to know when [the agents] were coming in," and laid down on the floor immediately. Hernandez was given Miranda warnings at the time. The next morning, some 11 hours later and before being questioned, he was again given Miranda rights and signed a waiver form. Agent Thomas found him calm and collected and "fairly cooperative." He admitted to possessing the methamphetamine found, and that it was intended for resale. He also indicated he was the leader of a large gang out of Texas and Mexico. He initially refused to give the phone passcode but did later provide it. Agent Thomas indicated he had no reason to believe he was under the influence, and had he believed that to be the case, he would not have questioned Hernandez. Hernandez, however, later testified that he had smoked methamphetamine, snorted cocaine and consumed 24 beers, and that he'd been consistently using the drugs for 30 days, and had slept little. He was, however, able to purchase the beer, rent the room and move belongings when he changed the room. He claimed to have used drugs just minutes before the arrival of the agents. He claimed to have been high at the time of the arrest and the later interview. The trial court had the benefit of a video of the second interview and the judge noted that his signature on the waiver form appeared the same as that on other paperwork available to the court, when he was presumptively sober. The Court's review of the video gave no indication that Hernandez was "fidgety or in any way unable to answer the questions or understand the questions." The Court noted he was even able to refuse to provide his phone passcode. He appeared lucid the entire time and the Court agreed, was capable of being questioned.

Hernandez was convicted and appealed.

ISSUE: Is a subject that is arguably intoxicated still subject to a valid interrogation?

HOLDING: Yes

[92] Id. at 306 (quoting Taylor v. Alabama, 457 U.S. 687 (1982)) (internal quotation marks omitted); see also Pacheco-Lopez, 531 F.3d at 429-30 (suppressing a second confession under Elstad because "there was no change in the time or place of the interrogation, or the identity of the interrogators"); cf. Coomer v. Yukins, 533 F.3d 477 because of the changed circumstances, which included a "time lapse of approximately three hours between the written statement in Coomer's apartment and her confession at the police station").

DISCUSSION: The Court reviewed Hernandez's argument and agreed that "prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination."[93]

Further, it noted:

> A confession is involuntary due to police coercion if (i) the police activity was objectively coercive; (ii) the coercion in question was sufficient to overbear the defendant's will; (iii) and the alleged police misconduct was the crucial motivating factor in the defendant's decision to offer the statement.[94] In assessing whether the alleged coercion was sufficient to overcome the defendant's will, "[r]elevant factors may include the defendant's age, education and intelligence; whether the defendant has been informed of his constitutional rights; the length and extent of the questioning; and the use of physical punishment, such as the deprivation of food or sleep."[95] Intoxication is another factor for the court to consider. Like other circuits, this court considers the impact of drugs and alcohol on the voluntariness of a confession on a "case-by-case basis and in view of other circumstances at play."[96]

The Court agreed with the trial court's assessment, that "Hernandez's function was not as impacted by his use of drugs and alcohol as he claimed." As such, his "waiver of rights and his responses to law enforcement questions were made knowingly, intelligently, and voluntarily and that the statements made during the interview were voluntary."

The Court upheld his conviction.

42 U.S.C. 1983 – FORCE

Family Service Association (Coil) v. Wells Township / Kamerer, 783 F.3d 600 (6th Cir. 2015)

FACTS: On December 25, 2011, at about 10 p.m., Coil and Starcher were walking home from a friend's house in Brilliant, OH. They stopped to rest, sitting on a guardrail. Officer Kamerer stopped to see if anything was wrong. The two men denied any problems. Officer Kamerer asked them for names, but Starcher hesitated. Coil got up and started walking away, which he later alleged caused Kamerer to "go off like a crazy person," screaming at them. The two men gave their names and according to the officer, began yelling "police brutality." Allegedly, Coil never struck the officer, but the officer slammed Coil to the ground, sprayed him with OC and left him cuffed in the street. Starcher then tried to intervene, causing Kamerer to go after him with OC, forcing him back into a yard. The officer then ran back into the road to where he'd left Coil and both were struck by a vehicle, and both were seriously injured.

Kamerer gave a different account, claiming that both men became combative as soon as he approached. He claimed Coil shoved him and that he then placed Coil under arrest. Coil allegedly then threw a pill bottle at him as "ID" and charged Kamerer – and that both men then attacked him. As the officer was trying to handcuff Coil, Starcher "continued to punch and slap the back of his head." He left Coil to tackle Starcher and at that point, as he was returning to Coil, both he and Coil were hit by a car.

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[93] Miranda v. Arizona, 384 U.S. 436 (1966).
[94] Mahan, 190 F.3d 416 (6th Cir. 1999) (citing McCall v. Dutton, 863 F.2d 454 (6th Cir. 1988)).
[95] Id. (citing Ledbetter v. Edwards, 35 F.3d 1062 (6th Cir. 1994)).
[96] U.S. v. Montgomery, 721 F.3d 568 (6th Cir. 2010) (collecting cases); see, e.g., U.S. v. Fletcher, 295 F. App'x 749 (6th Cir. 2008) (upholding confession as voluntary based on officers' testimony that Appellant "did not seem impaired, was not swaying or unsteady, had no trouble signing the consent form, and appeared to be coherent."); Abela v. Martin, 380 F.3d 915 (6th Cir. 2004) (holding that a defendant cannot show that his confession should have been suppressed merely because he claimed that he drank alcohol the night before his arrest), abrogated on other grounds by Guilmette v. Howes, 624 F.3d 286 (2010); Garcia-Donantes v. Warren, 769 F. Supp. 2d 1092 (E.D. Mich. 2011) (holding that, because there was no evidence that petitioner was still intoxicated at the time he spoke with police or any further evidence of coercion, petitioner was not entitled to writ of habeas corpus because he had not established his conviction was obtained with statements that were involuntary).

Devore was a witness to part of the situation. She testified that it was dark, Coil was wearing dark clothes and that Kamerer's vehicle was also unlit, with neither emergency or regular lights on. Coil was already on the ground and she saw Starcher "lightly 'pushing at'" Kamerer's back. She saw the approaching headlights of the car that struck the two men and that Kamerer had rushed back to grab Coil.

Both Coil and Kamerer were seriously injured, with Coil suffering a traumatic brain injury that left him with limited brain function and the need for permanent round the clock care. Coil's legal guardian, The Family Service Association, filed suit on his behalf. Kamerer moved for summary judgement and was denied. Kamerer appealed.

ISSUE: Is walking away from an officer posing questions enough to detain?

HOLDING: No

DISCUSSION: The Court looked to each of the claims. First, the Court noted the "police officers may not stop citizens minding their own business on a public street in the absence of reasonable suspicion that they have committed, or are about to commit, a crime."[97] Further, a "refusal to cooperate" is not enough for a detention or seizure.[98] And, it noted, "walking away from an officer does not create … reasonable suspicion."[99] The Court agreed that a "jury could reasonable believe that Kamerer did not adhere to these requirements during his encounter with Coil." Starcher claimed they did nothing to suggest they'd committed a crime. Walking at night, sitting on a guardrail, being in a high crime area is not sufficient – and "walking without evident purpose remains an innocent, even enjoyable, activity in this country, whether in a high-crime area or a suburban park."[100]

The Court agreed that to challenge the two men required at least reasonable suspicion and the evidence before the court was simply not present that this was the case. Further, leaving a handcuffed prisoner in the street for an appreciable period of time, especially at night, made it "painfully obvious" that they might be struck by a car. Further, the 911 dispatches "show a two-minute gap between when Kamerer radioed that he had both men 'chemically restrained' and when he called for an ambulance, which occurred 'immediately after the car struck him and Coil." A two minute delay was sufficient to prove his deliberate indifference to Coil's situation. The Court noted that despite Kamerer, "quickly and bravely," trying to save Coil, that does not mean he wasn't behaving recklessly (as opposed to negligently) by leaving him where he did in the first place He had taken Coil from a safe location (off the road) to an unsafe one, creating the peril.

The Court affirmed the ruling denying qualified immunity to Kamerer.

42 U.S.C. 1983 – VIDEO EVIDENCE

Jahn v. Farnsworth, 2015 WL 3938035 (6th Cir. 2015)

FACTS: Jake Jahn was a high school senior in Marysville, Michigan. He became a suspect in the theft of a laptop computer that contained confidential information. School officials decided to "keep this a school issue" and did not contact police. Jahn was questioned by school officials and they explained the evidence they had, he was also told what the likely ramifications would be. He admitted to the theft and told his father, by phone, where it could be found. His father brought the computer back to the school, where it was found to have been reimaged and the data destroyed. Jake denied being involved in other thefts from the school. Jake was then told by the school that they were going to involve the police and contact the college where he intended to go. Another possibly stolen item was found in his possession but it was discovered the next day the item was not, in fact, stolen. Jake was escorted off the school grounds, but he was told he would be allowed to finish classes from home for full credit. (His father

[97] Terry v. Ohio, supra.
[98] Florida v. Bostick, 501 U.S. 429 (1991).
[99] U.S. v. Beauchamp, 659 F.3d 560 (6th Cir. 2011).
[100] Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).

stayed behind to talk to the school officials.) The school official who escorted Jake told his father that he should "keep an eye on" him as he "needed some support." Jake was suspended.

That evening, Jake died in a car wreck, having driven the vehicle into a concrete pillar. The Jahns filed suit under §1983, claiming a lack of due process. The District Court ruled in favor of the school and the Jahns appealed.

ISSUE: Is the "state" responsible for the suicide of a suspect not in custody?

HOLDING: No

DISCUSSION: The Jahns argued that the school was obligated to show Jake the video evidence that implicated him in the crime. The Court noted that he knew what the evidence was, even though he was not allowed to actually view it, and that was enough for the initial proceeding. (Had he lived and been able to appeal his suspension, the matter would have been different.) The Court agreed that with such an onerous punishment, he was entitled to a hearing, but his suicide prevented that from occurring.

Further, there was no state created danger as he committed suicide off of school grounds after being released to his parents.

The Court affirmed the dismissal.

42 U.S.C. §1983 – HECK

Apsey v. Chester Township, 608 Fed.Appx. 335 (6th Cir. 2015)

FACTS: On July 13, 2010, Officers Brickman and Pocek (unidentified Ohio agency) were dispatched, separately, to a tip that Apsey would be driving through a specific intersection. He was known to have a suspended OL. The tipster (the assistant fire chief) had seen him earlier that same day, driving. The officers did, in fact, spot Apsey, crossing a yellow line. They stopped him, with his young son in the vehicle – the child attended a nearby daycare. Apsey produced paperwork on his driving status, which showed he was limited to driving for work purposes. Checking the state law enforcement database, which showed he had a suspended OL but did not indicate that he had any driving privileges at all. (The database was able to show by special notation if there were some driving privileges.)

Apsey later stated that Brickman walked back and forth between the cars numerous times, asking him questions, while Pocek simply stood by the vehicle. Apsey stated he was going to a work site, but the information was inconsistent with the location he provided and finally Brickman asked him if he was taking his son to daycare. Apsey denied it. He was asked if he could show proof about the job site he claimed was his destination. Brickman decided to follow Apsey to the job site while Pocek contacted the day care and confirmed the child had been due at check in. After driving some time, Apsey pulled into a driveway and then started a U-turn. Apsey told Brickman that he'd pulled into the wrong driveway and indicated "Neal" – his supervisor – was "right there." Neal approached but Brickman refused to speak to him, instead, arrested Apsey for driving under suspension and obstruction of official business. A traffic offense was later added.

Apsey negotiated a plea deal to the traffic offense and the other charges were dismissed. He then sued Chester Township, the two officers, the tipster and Apsey's ex-wife (the tipster's cousin) – as he alleged the issue was a set-up to affect his custody dispute with his ex-wife. The Court denied summary judgement to the officers on claims of false arrest and malicious prosecution. The officers appealed.

ISSUE: If one admits to a criminal offense, can they sue for false arrest?

HOLDING: No

DISCUSSION: The Court noted that "under Ohio law, '[a]n accepted guilty plea in an Ohio criminal proceeding is the equivalent of the defendant taking the witness stand and admitting under oath his guilt of the offense charged.'" By his plea to the traffic offense, he admitted that he committed the offense and as such, that meant there was no genuine dispute of material fact as to probable cause for the arrest.

And, the Court continued, "if an officer has probable cause, then the resulting arrest will not violate the Fourth Amendment.[101] If there is probable cause, "then the initiation of criminal proceedings is not a malicious prosecution in violation of the Fourth Amendment.[102]

Further, the Court noted that "in a §1983 action, each defendant's liability must be individually assessed to ensure that no defendant is improperly held liable for the conduct of another.[103] The Court concluded that Pocek's "participation in the day's events insufficient to render him liable as a matter of law." As such, the Court reversed "the denial of qualified immunity to Pocek on both the false arrest and malicious prosecution claims."

With respect to Brickman, the parties had stipulated that the database had confirmed that Apsey's driving privileges were suspended and as such, it was reasonable for Brickman to depend upon that information. Further, even if Brickman believed that Apsey had some ability to drive, it was reasonable to think he was violating them by making the daycare stop, and that his responses were intended to prevent Brickman from realizing he was in violation. As such, the court reversed the denial of qualified immunity on the false arrest claim.

With respect to malicious prosecution, the Court noted that Brickman's report, "provided the prosecutors with sufficient evidence of probable cause to prosecute." Nothing changed "between the arrest and the time criminal proceedings were initiated" to dissipate that probable cause. As such, the Court also reversed the denial of summary judgement on that claim as well.

Webb / Price v. U.S., 789 F.3d 647 (6th Cir. 2015)

FACTS: Webb and Price were separate defendants caught up in an investigation of Mansfield (OH) drug trade. The Richland County SO had launched Operation Turnaround after the death of Harris, which was believed to be drug related, at the end of 2004. Bray was recruited as a CI. In August, 2005, Lucas and Cross (DEA) joined the investigation and made Bray a DEA informant, and DEA task force officers were also involved. Bray made several buys and ultimately, over 24 people were charged with federal drug crimes. Lucas served as the primary case agent in the indictment of Webb and Price.

Later, however, while Bray was in prison for an unrelated crime, he "disclosed that Lucas conspired with him to frame innocent individuals—including Webb and Price." The OIG (Dept. of Justice) launched an investigation and discovered that many of the targets of the operation were innocent, having been targeted by Bray. Bray later testified that Lucas did not, in fact, conspire with him and that he'd acted alone in the fraud but the OIG "concluded that law-enforcement officials supported Bray's false identifications by knowingly making false reports and testimony and by covering up his misdeeds." Bray was convicted of perjury and violations of civil rights. Deputy Metcalf (RCSO) and Lucas were charged with a variety of federal offenses. Metcalf pled guilty and Lucas was acquitted, despite a federal report that "concluded that Lucas falsified reports and testimony to corroborate Bray's false identifications."

Webb and Price filed suit against Lucas and the other involved officers on false arrest and other claims. Following discover, the Court determined that most of the defendants, other than Lucas, lacked any material role in the decision to prosecute Webb and dismissed them from the case. Webb argued that certain documents were not turned over that were pertinent. The Court upheld the dismissal and Webb appealed. Price also argued but was held to lack standing for his specific situation. Price also appealed.

[101] See Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007).
[102] *See* Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).
[103] See Pollard v. City of Columbus, 780 F.3d 395 (6th Cir. 2015).

ISSUE: Does involvement in bringing false charges against a subject constitute malicious prosecution?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court began by noting that for a defendant must be shown to have standing in a case, they must "have suffered an injury-in-fact, fairly traceable to the defendant's allegedly unlawful conduct, and likely to be redressed by the requested relief."[104] Since Price had pled guilty to other charges, and was in custody for those charges during the duration of the case, the trial court had ruled he had suffered no harm from being illegally prosecuted in the instant case. The Court, however, ruled that "Price pleaded guilty to specific state-law drug and gun offenses and agreed to be imprisoned only for those offenses. To the extent that he forfeited any Fourth Amendment rights by pleading guilty, he did not forfeit his Fourth Amendment right to be free from imprisonment for unrelated crimes that he did not commit." The Court agreed that as such, he had a right to bring the lawsuit.

Looking at the merits of the respective claims, The Court agreed that "freedom from malicious prosecution is a clearly established Fourth Amendment right.[105] To succeed on a malicious-prosecution claim under Bivens or §1983, a plaintiff must prove the following: (1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceedings, the plaintiff suffered a deprivation of liberty apart from the initial arrest; and (4) the criminal proceeding was resolved in the plaintiff's favor."[106]

Both Price and Webb were, it was agreed, deprived of their liberty as a result of "criminal proceedings that were resolved in their favor." The Court then looked to the term "participated" and held that its meaning was "akin to 'aided.'" To be held to have participated, "the officer must participate in a way that aids in the decision, as opposed to passively or neutrally participating." Also, probable cause would normally be satisfied with a grand jury decision, but … "an exception to this general rule applies when defendants knowingly or recklessly present false testimony to the grand jury to obtain the indictment.[107]

With respect to Lucas, the trial court had held that he "did not recklessly or knowingly make false statements in his grand-jury testimony against Webb." However, the Court disagreed, finding that he was a "knowing participant in the scheme to frame Webb." Even though Lucas later recanted his statement implicating Webb, the Court ruled that it was up to the jury to determine "whether Bray was telling the truth in his first five interviews with federal investigators, Lucas's criminal trial, or neither." In addition, even if not part of the scheme, the jury could conclude that he should have realized what Bray was doing. The Court agreed that "a law-enforcement defendant is deliberately indifferent—and therefore not entitled to qualified immunity—if he mistakenly identifies an individual as a suspect when the individual does not match the suspect's description" - as what the case here.[108] Due to the dispute in material fact as to the misidentification, the Court reversed the holding as to probable cause to prosecute Webb. Further, Lucas was directed implicated in the decision to do so, and that Metcalf was also involved. (Other officers were held not to be directly involved, however.) The Court followed the same logic with respect to Price, who was involved in a buy separate from Webb, and also finding that Metcalf and Faith (a task force officer) were also not entitled to qualified immunity.

The Court also addressed an issue with respect to a tampered recording, in which material had been deleted. The Court noted that "willful spoliation of relevant evidence is generally punished by an adverse-inference jury instruction.[109] Even though it could not be shown what was deleted, or by whom, the Court agreed that it was proper to introduce the spoliation.

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[104] Nat'l Rifle Assn. of Am. v. Magaw, 132 F.3d 272 (6th Cir. 1997).
[105] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010).
[106] Bivens v. Six Unknown Named Agents, 403 U.S. 388 (1971).
[107] Martin v. Maurer, 581 F. App'x 509 (6th Cir. 2014); Robertson v. Lucas, 753 F.3d 612 (2014).
[108] Gray v. Cuyahoga County Sheriff's Department, 150 F.3d 579 (6th Cir. 1998).
[109] See Automated Solutions Corp. v. Paragon Data Sys., Inc., 756 F.3d 504 (6th Cir. 2014); Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003).

The Court reversed the grants of summary judgment, as indicated above.

42 U.S.C. 1983 – FRANKS

Meeks (and others) v. Larsen (and others), 611 Fed.Appx. 277 (6th Cir. 2015)

FACTS: Over a period of a year and a half, the FBI investigated the Michigan Hutaree, a militia group that had ""acquired a significant arsenal of weapons, including components of pipe bombs, and trained as a paramilitary organization." Several members were indicted, including Meeks, Piatek and stone, on a variety of federal charges. On March 23, 2010, and over ensuing days, a search warrant was issues against several homes involved in the case. At four locations, "law enforcement officials recovered items listed in the search warrants, including firearms and ammunition." Each of these warrants was supported by an affidavit by Sandra Larsen and included information from Haug (a co-defendant). Other agents were also involved in the process as well. In the criminal cases, subjects sought to suppress evidence, arguing that there was a lack of nexus between the locations and criminal activity. The trial court denied the motions and despite that, Piatek, Meeks and Stone were acquitted. The three filed suit under Bivens against the federal agents under the Fourth Amendment.[110] The District Court granted motions to dismiss and the three men appealed.

ISSUE: In raising a Franks issue, must the allegations be specific?

HOLDING: Yes

DISCUSSION: As in the state/local equivalent, a Bivens action states that "qualified immunity is an affirmative defense that shields government officials performing discretionary functions from liability for civil damages insofar as their conduct does "'not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"[111] After a defendant raises the defense, the burden shifts to the plaintiff to demonstrate that the government official violated a right so clearly established "that every 'reasonable official would have understood that what he [was] doing violate[d] that right.'"[112] In analyzing an assertion of qualified immunity, a court will determine (1) whether, viewing the evidence in the light most favorable to the injured party, a constitutional right has been violated; and (2) whether that right was clearly established.[113]

The court looked to the individual claims. First, all three brought claims of malicious prosecution against Laarsen for "allegedly instigating a grand-jury investigation based on false and misleading information and unlawfully seized evidence."

> To succeed on a Fourth Amendment malicious prosecution claim, a plaintiff must demonstrate that: (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was a lack of probable cause for the prosecution; (3) the plaintiff suffered a deprivation of liberty, beyond the initial seizure, as a result of the criminal proceeding; and (4) the criminal proceeding was resolved in the plaintiff's favor.

The three men would arrested followed an indictment by the grand jury, and thus their claims "thus face a high burden because "it has long been settled that 'the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.'"[114] There is an exception to this general rule when the defendants knowingly presented false testimony to the grand jury to obtain the indictment, or testified with a reckless

[110] Bivens, supra.
[111] Sheets v. Mullins, 287 F.3d 581 (6th Cir. 2002) (quoting Harlow v. Fitzgerald, 457 U.S. 800 (1982)).
[112] Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2083 (2011) (quoting Anderson v. Creighton, 483 U.S. 635, 640 (1987)).
[113] Saucier v. Katz, 533 U.S. 194, 201 (2001).
[114] Higgason v. Stephens, 288 F.3d 868 (6th Cir. 2002) (quoting Ex parte U.S., 287 U.S. 241 (1932)).

disregard for the truth.[115] However, nothing in their claims even indicated what the allegedly "false and misleading information was." As such, that claim must fail.

They also claimed that the items were seized without probable cause. The Court noted that : "[i]t is well-established that a government investigator is liable for violating the Fourth Amendment when he deliberately or recklessly submits false and material information in a warrant affidavit."[116] The question whether a warrant affidavit is so defective as to support a claim for damages under the Fourth Amendment is governed by the standard set out in Franks v. Delaware.[117] Under this approach, "a plaintiff must establish: (1) a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth and (2) that the allegedly false or omitted information was material to the finding of probable cause." Under the Franks standard, an individual challenging a warrant affidavit must "point out specifically the portion of the warrant affidavit that is claimed to be false," and this showing "should be accompanied by a statement of supporting reasons." When applying this standard in the criminal context, the Court has "stressed that: a defendant who challenges the veracity of statements made in an affidavit that formed the basis for a warrant has a heavy burden. His allegations must be more than conclusory. He must point to specific false statements that he claims were made intentionally or with reckless disregard for the truth. He must accompany his allegations with an offer of proof. Moreover, he also should provide supporting affidavits or explain their absence."[118]

The Court agreed that usually, immunity is a given is there is a "judicially secured warrant, but "the warrant is so lacking in indicia of probable cause, that official belief in the existence of probable cause is unreasonable."[119] However, although the complaint argued that Haug did not share "materially important information" and "deliberately provided false information" – it failed to "identify any statements in the warrant affidavit that are alleged to be false or materially incomplete." As such, the complaint simply made "conclusory statements" as to the alleged falsity of several parts of the warrant. Other parts of the warrant, such as the address indicated for one of the subjects, alleged to be incorrect were, at least based upon the information available to the officers, arguably correct.

After addressing several other issues, the Court ruled that the three had "have failed to plausibly allege that their constitutional rights were violated during the government's investigation of the Hutaree or that they are entitled to a remedy under *Bivens*. Therefore, we AFFIRM the district court's decision dismissing their complaint."

TRIAL PROCEDURE / EVIDENCE - COMPUTER EVIDENCE

U.S. v. Schumacher, 611 Fed.Appx. 337 (6th Cir. 2015)

FACTS: As part of an investigation into a computer account at a particular address, Agent Casey (U.S. Secret Service) had developed probable cause that an individual there "had received, possessed, and/or distributed child pornography over a peer-to-peer network." He used software that covertly connected to a specific IP address and then filtered for possible child pornography, using hash values. Over 4,000 files with suspect hash values were detected. One of the two occupants of the home was Schumacher.

As a result of a search warrant and evidence retrieved, Schumacher was charged with one count of receipt of child pornography and one of possessing a computer containing child pornography.[120] Schumacher moved for suppression, arguing that the warrant included unreliable information. The District Court denied his motion. Schumacher took a conditional guilty plea and appealed.

[115] Martin v.Maurer, 581 F. App'x 509 (6th Cir. 2014), Robertson v. Lucas, supra.
[116] Johnson v. Hayden, 67 F. App'x 319 (6th Cir. 2003).
[117] CITE See Johnson, 67 F. App'x at 324 (applying Franks standard in Bivens case); Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989) (applying Franks to evaluate a § 1983 claim).
[118] U.S. v. Bennett, 905 F.2d 931 (6th Cir. 1990) (internal citations omitted).
[119] Yancey v. Carroll Cnty., Ky , 876 F.2d 1238 (6th Cir. 1989). Hale v. Kart, 396 F.3d 721 (6th Cir. 2005).
[120] 18 U.S.C. 2252(a)(2); 2252A(a)(5)(B).

ISSUE: Is it necessary to prove the validity of a scientific method used in getting a search warrant?

HOLDING: No (but see discussion)

DISCUSSION: Schumacher argued that the search warrant "lacked probable cause because it failed to establish the scientific reliability of the software on which the affidavit's allegations were based" – and he was denied the opportunity to challenge it in an evidentiary hearing. The Court noted that his specific complaints, that the software wasn't named or statistics as to its reliability provided would not have changed the end result. The Court found no requirement that the functionality of such investigative software be discussed in a search warrant, although certainly, it was subject to discovery.

The Court affirmed his plea.

TRIAL PROCEDURE / EVIDENCE - HEARSAY

Nobles v. Woods, 2015 WL 3450116 (6th Cir. 2015)

FACTS: On December 31, 2000, Kolby Bohannon was killed by "stray gunfire" in Michigan. Nobles was charged with murder as well as related offenses. Nobles apparently accidentally shot Bohannon when they were going into a local restaurant in search of another individual, who had attacked and injured Bohannon's brother earlier. Whaley (Jeter's girlfriend) later testified that Nobles had admitted to being the shooter, but other witnesses, including Jeter, indicated that Rocky Bohannon, Kolby's brother, was the shooter. Charges were placed against Nobles, obstruction of justice and attempted subornation, because allegedly Nobles tried to influence Whaley's testimony.

Jeter died in an unrelated incident, subsequently, but prior to his death, he had provided a statement that indicated Nobles was the shooter. After Nobles denied threatening Whaley, the government sought to introduce Jeter's statement. The statement was admitted and in addition, through closing arguments, the prosecutor noted that "Jeter speaks from the grave."

Nobles was convicted of murder, but not the additional charges. He appealed through the state courts and was denied. He then requested habeas corpus through the federal courts.

ISSUE: May a testimonial statement made by a dead declarant be admitted for impeachment?

HOLDING: Yes

DISCUSSION: Nobles argued that he was denied the benefit of confronting Jeter and that the statement should not have been admitted as Jeter was unavailable for cross-examination. Both sides agreed that statement was testimonial, as it was made during a police interview. The trial court had instructed the jury to "consider Jeter's statement for impeachment purposes alone, not for its truth" and as such, it was not hearsay. The Court agreed that basing the admission on impeachment was shaky ground, but that it did not "rise to the level of a Confrontation Clause violation." Instead, the statement was only introduced to impeach Nobles, who had "denied calling Jeter a snitch or having any knowledge of Jeter's statement [implicating him in the murder]." The Court noted that the jury was properly instructed as to how to consider the statement, as impeachment rather than proof that Nobles in fact committed the murder, and upheld Nobles conviction.

TRIAL PROCEDURE / EVIDENCE - PRIOR BAD ACT

U.S. v. Weaver, 610 Fed.Appx. 539 (6th Cir. 2015)

FACTS: On July 7, 2013, Sgt. Adams and Patrolmen Yates and Burnett responded to an impending fight. Sgt. Adams questioned a man in the front, while the officers went to the back, finding

five men, including Weaver, on the patio. The officers recognized Weaver as being the subject of an outstanding warrant and asked his name, he gave a false one. They took him toward the front to be identified. On the way, Sgt. Adams spotted Weaver "drop an object" and alerted the officers. "Weaver grabbed the dropped object and attempted to flee, but the patrolmen gave chase and tackled him to the ground." Weaver threw the item towards the fence line. Eventually a firearm was found in the area and a small bag of cocaine was found where Weaver had been sitting.

Weaver, a convicted felon, was charged with possession of the firearm, as well as the cocaine, under federal law. Prior to trial, the prosecution gave notice that it intended to introduce evidence that he had an outstanding arrest warrant, gave a false name and attempted to flee. The Court admitted only the latter two items. He was convicted and appealed.

ISSUE: Is evidence that a subject gave a false name upon arrest admissible?

HOLDING: Yes

DISCUSSION: Weaver argued first that the false name issue could not be introduced under FRE 404(b) as a "prior bad act." The Court noted that "other-act evidence is admissible in order to prove material non-character issues so long as the probative value is not substantially outweigh[sic] by the potential prejudicial effect." Weaver admitted that he provided a false name so the first element required under federal law to admit such evidence was already met and "spoke to Weaver's consciousness of guilt." Such evidence can be admitted to "demonstrate a defendant's state of mind" as well. Even though he argued that he "could have lied about his identity to prevent the officers from discovering his outstanding domestic-abuse arrest warrant, rather than his firearm possession."

Further, the trial court "admitted the false-name evidence as non-character background evidence (also known as *res gestae* evidence)."[121] The "background evidence" involved "inextricably intertwined with the charge offense." "Proper background evidence has a causal, temporal or spatial connection with the charged offense."[122] Further, the Court agreed, the evidence indicated that he was, if not in actual, at least in constructive possession of the firearm.[123] The evidence indicated that the firearm was located immediately after he was observed throwing something in that direction. Although it could, possibly, have belonged to another man who was in the vicinity, that was for the jury to decide.

The Court upheld Weaver's conviction.

TRIAL PROCEDURE / EVIDENCE - EXPERT

Thomas v. Heidle, 2015 WL 3634491 (6th Cir. 2015)

FACTS: On March 23, 1991, the Cooks (John and Yvonne) were driving from Wisconsin to North Carolina. When they stopped near Knoxville, John was shot. The assailant then pushed his way into the car and Yvonne had an excellent opportunity to see his face. Despite her pleas to stop and release them, so she could get help for John, he refused to do so. After a few minutes, she knew John had died. A few minutes later, the robber pulled over and demanded cash and ended up with between $500 and $1,000. Yvonne "handed the money over to the assailant, her hands covered with her husband's blood." The assailant (Thomas) ordered Yvonne to the ground and dumped John's body out of the van. He was trying to load the weapon when another car came along. The assailant then fled the scene. Yvonne was able to provide a detailed description of the attacker but no suspect was identified.

When Yvonne returned to Wisconsin, she underwent hypnosis and afterward, a police artist drew a sketch based on her recall. She gave it a "seven out of ten" for the accuracy of the likeness. In 2000,

[121] U.S. v. Adams, 722 F.3d 788 (6th Cir. 2013).
[122] U.S. v. Hardy, 228 F.3d 745 (6th Cir. 2000).
[123] U.S. v. Nelson, 725 F.3d 615 (6th Cir. 2013).

Knoxville PD identified two suspects and eventually, Thomas was arrested. A friend sent Yvonne a photo of the newspaper article on the arrest, which included a photo of Thomas.

Thomas was charged and later moved to suppress Yvonne's "identification testimony on the bases that it was influenced by hypnosis and that it was the product of an overly suggestive identification." The trial court denied the motion and the appellate courts denied further appeal. He also tried to introduce testimony of an expert in eyewitness identification, but it was disallowed based on state evidentiary rules.

At trial, Yvonne identified Thomas as the assailant. She testified that while she was focused on her husband, she had "significant interaction" with the assailant as she tried to get him to stop. She acknowledged she'd mostly seem him in profile, however.

Thomas was convicted of murder and related charges, and appealed the issue on the state's rule barring expert witness testimony on suspect identification.

ISSUE: Is an expert permitted in a false suspect identification defense?

HOLDING: Yes, but not required

DISCUSSION: The Court looked at the Tennessee rule of evidence that held that there was no reason to use an expert, and that "a defendant can adequately test an eyewitness's memory with cross-examination, that jury instructions can guide the jury in its consideration of credibility, and that the proposed expert testimony could confuse or mislead the jury or cause the jury to abandon its role as the finder of fact." The expert in question "explained that her scientific expertise did not enable her to opine on "whether [Yvonne Cook's identification] is accurate or not." Instead, she would "apply the general principles from the field to the specific circumstances of the case" using information from the investigation. She identified "identified "factors present in the current case that are known to create problems for accurate eyewitness testimony." These included extreme stress and fright, "weapon focus," an "extraordinarily long retention interval," and identification based on a "highly suggestive newspaper article." Loftus stated that hypnosis can increase a witness's confidence. She further explained that confidence is malleable—meaning it is influenced by suggestive information—and is "only weakly related to accuracy." Her goal, she explained was to ""correct some of the misperceptions" some jurors have about memory, giving the jury a scientific basis to "make its own decision."

The Court agreed that criminal defendants have a strong interest in having an expert testify in such cases, and looked to Ferensic.[124] That case agreed that : "[e]yewitness misidentification accounts for more false convictions in the United States than any other factor." The court also reasoned that "the current near-universal acceptance of the reliability of expert testimony regarding eyewitness identification" distinguishes the per se exclusion of this testimony from the per se exclusion of polygraph evidence that the Supreme Court upheld in Scheffer.[125] These factors made the admission of the expert testimony a matter of fundamental importance to the defendant."

However, the Court agreed the exclusion "was not arbitrary or disproportionate in a constitutional sense, let alone a violation or unreasonable application of clearly established constitutional law. It was not arbitrary or disproportionate for the Court to reach the conclusion that testimony like Loftus's would not "substantially assist the trier of fact." The Court noted that "fair-minded jurists still disagree on the exclusion of expert testimony on eyewitness identification, even when it is effectively excluded on a blanket basis."

The Court agreed that his rights had not been clearly violated and upheld his conviction, given that a substantial volume of other evidence supported the conviction.

[124] Ferensic v. Birkett, 501 F.3d 469 (6th Cir. 2007).
[125] U.S. v. Scheffer, 117 S.Ct. 1818 (1997).

TRIAL PROCEDURE / EVIDENCE - BRADY

Sutton v. Carpenter, 2015 WL 3853039 (6th Cir. 2015)

FACTS: Sutton (along with his uncle) was convicted on the murder of a friend, Griffin, and Griffin's sister, Branam, in 1992. At trial, time of death was a primary issue, as the body was not found immediately. The defense presented the testimony of Dr. Wolfe, and the prosecution rebutted that with testimony from Dr. Harlan – the latter was a pathologist.

Losing his appeals through the state courts, Sutton sought a petition of habeas corpus. During the pendency of his appeals, Dr. Harlan's medical license was revoked under allegations that he'd "engaged in improper forensic practices" for many years. Sutton moved to have his conviction overturned arguing that the prosecution had "suppressed impeachment evidence—i.e., information related to the state's investigation of Dr. Harlan—in violation of Brady v. Maryland"[126] In a hearing, the Court found no proof that the prosecution "knew or should have known of the investigation." As such, the Court refused the appeal on that cause. Sutton further appealed.

ISSUE: Must a prosecutor affirmatively seek out impeachment material?

HOLDING: No

DISCUSSION: Sutton argued, citing Kyles, that "the prosecution had a constitutional duty to learn of the state's investigation into Dr. Harlan and to disclose that evidence, which he then could use to impeach Dr. Harlan's credibility as a time-of-death expert."[127] The Tennessee Bureau of Investigation was involved in both cases, but there was no indication that there was any overlap in investigators. The Court found no reason to "impute the knowledge of the TBI agents investigating Harlan to those working on Sutton's case, or to impose an affirmative duty on the prosecution to learn all potential witness credibility defects known by members of a cooperating government agency." In U.S. v. Graham, the Court had ruled that "Brady clearly does not impose an affirmative duty upon the government to take action to discover information which it does not possess."[128] Most circuits had "confined prosecutors' sleuthing duties to material information possessed by members of the prosecution team." Further, the Court noted, there was no prejudice to the case, as the remaining evidence strongly supported his conviction and his own expert was simply a general practitioner.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE - SUSPECT ID

U.S. v. Drew, 786 F.3d 443 (6th Cir. 2015)

FACTS: On December 7, 2012, a man entered a KFC in Tennessee, wearing clothing that was described in a detail manner, and a "dark-blue toboggan hat pulled over his face with eye holes cut out." The robber pointed a gun at the cashier, Baker, and threatened to kill him unless he handed over the money in the register. However, Baker could not open the register so the robber left. Baker called the police. About a half hour later, the same individual, apparently, attempted to rob a market some 16 miles away. There, the cashier, Harris, was able to lock himself in an office and again, called 911. A customer followed the suspect, who was on foot, and noted where he'd gone, and then returned to the market to provide the officers with the information. A few minutes later, officers found Drew lying in the woods, some 1500 feet from the market. He was dressed in the same distinctive manner as identified in both robberies, and a gun was found under leaves where he was located. Harris was shown a photo of the robber from the neck down, showing his clothing, and identified him from that. (Surveillance video also confirmed the clothing.)

[126] Id. (citing Scheffer, 523 U.S. at 309). S. 83 (1963).
[127] Kyles v. Whitley, 514 U.S. 419 (1995).
[128] U.S. v. Graham, 484 F.3d 413 (6th Cir. 2007).

Drew, a felon, was charged in federal court with having the weapon and for armed robbery. He was convicted and appealed.

ISSUE: May an ID be upheld even if some evidence was arguably improper?

HOLDING: Yes

DISCUSSION: The Court noted that even if improper, upon which the court did not rule, it agreed that that government's evidence was more than adequate without it. Even though there were some discrepancies, the Court agreed that notwithstanding that, the jury's decision was proper.

Drew's convictions were affirmed.

TRIAL PROCEDURE / EVIDENCE - VOICE IDENTIFICATION

U.S. v. Strong / Banks, 606 Fed.Appx. 804 (6th Cir. 2015)

FACTS: On October 23, 2012, Hall pulled into his driveway and got out of his car. He had noticed two men on the street and as he approached his house, he heard footsteps behind him and turned. He "found himself confronted by one of the two men, who was now pointing a taser and gun at him." The other man stood as a lookout. Hall suspected they were after his car, a Lexus. Hall lost his car keys in a scuffle. He fled, and was shot while jumping over a gate. He "played dead." The two men drove off in the Lexus; Hall called the police. Officer Murden had heard the police call about the carjacking and spotted the vehicle. When he initiated the traffic stop, the Lexus took off, crashing a few minutes later. Strong and Banks were apprehended, still wearing the same clothing. Two firearms were found in the vehicle.

While in custody, Banks made several phone calls from the jail. Officer Harris later testified as to how she connected Harris to the calls, which were made from a general intake area available to a number of prisoners. She linked the calls to him using the numbers called and listening to the recorded conversations. Although she was not personally familiar with him, she had gained familiarity with his voice with other calls that were specifically linked to him by his use of a unique number provided to each inmate, and it was noted, the calls were to Harris's mother, while Banks was in custody and concerned the carjacking.

At trial, it was determined that Banks had shot at Hall, and he was convicted of a variety of federal charges to that effect. Strong was convicted of one count of carjacking and several weapons charges. Both appealed.

ISSUE: May a lay person make a voice identification?

HOLDING: Yes

DISCUSSION: The court agreed that the evidence linking Banks to the calls was more than sufficient to accept Officer Harris's identification of his voice.

The court upheld Banks' conviction. (Strong's conviction was affirmed as well, on unrelated reasons.)

ELECTION

Russell v. Lundergran-Grimes, 784 F.3d 1037 (6th Cir. 2015)

FACTS: Russell is the owner of a business in Campbell County. His property is located approximately 150 feet from a polling location, and separated from it by a four-lane highway and by

guardrails along the roadside." Russell allowed several candidates to place signs on his property. On election day, he routinely personally displayed signs and distributed campaign literature on his property. In both the primary and general elections, 2012, deputy sheriffs removed the signs due to their proximity to the polling site. They did so again in the primary election of 2014. Stating his intention to stand on the same side of the road as the polling place, some 200-300 feet away, he claimed that he feared prosecution under KRS 117.235(3) – which prohibits electioneering activities within 300 feet of a polling place.

Russell filed sued under 42 U.S.C. §1983, alleged the Kentucky statute violated his free speech rights. Eventually, the District Court held that the statute was invalid and issued a permanent injunction. Kentucky brought an emergency appeal, and was allowed to have a buffer-zone law for the general election, but it did not allow the statute to be enforced on private property. Expedited review was granted in anticipation of the May 19, 2015, primary election.

ISSUE: Is the 300 feet buffer zone for electioneering in Kentucky too large?

HOLDING: Yes

DISCUSSION: The Court noted that the threat of enforcement by the Attorney General was sufficient to bring that office into the case, as well as the other parties named (including but not limited to the Secretary of State), which allowed the case to move forward under the Eleventh Amendment. Specifically, it noted that:

> A citizen who wishes to engage in political speech, but is informed by government officers that his speech violates state law, need not prophesy precisely what actions statewide officials actively administering that statute—including promulgating regulations that might impact his ability to speak—will take against him before the Constitution allows him the opportunity to prove that the state law violates the First Amendment.

Since the Attorney General "has concurrent jurisdiction with county prosecutors to prosecute violations of §117.235(3)," and Russell is under legitimate threat of suffering prosecution, it is appropriate to bring the action.

With respect to the merits of the case, the Court noted that following the Court upholding a 100-foot buffer in Burson v. Freeman[129] and our subsequent decision invalidating a Kentucky statute creating a 500-foot buffer zone in Anderson v. Spear,[130] Kentucky enacted the current statute, with a 300-foot buffer. The Court noted that ""laws that burden political speech are subject to strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest."[131] The burden for justification falls to Kentucky, and "strict scrutiny is the rule so long as the burden is both content-based and viewpoint-neutral." A state law can be held valid if it is reasonable and "does not significantly impinge on constitutionally protected rights." The question is how large of a restricted zone is permitted – given the need to "balance the tension between the two compelling interests of facilitating the franchise while preserving ballot-box integrity."

The Court noted that:

> The area immediately surrounding a polling booth might lose its character as a traditional public forum on Election Day, because the Framers traditionally did not regard such spaces as open for speech during an election.[132] But the spaces adjacent to this 100-foot radius, which often include sidewalks and streets, are usually traditional public fora.[133] To the extent officials wish to expand

[129] 504 U.S. 191 (1992).
[130] 356 F.3d 651 (6th Cir. 2004),
[131] Citizens United v. FEC, 558 U.S. 310 (2010) (internal quotation marks omitted); see also McCutcheon v. FEC, 134 S. Ct. 1434 (2014).
[132] See Burson v. Freeman, 504 U.S. 191 (1992).
[133] Id.

> a prohibition on speech to encompass this broader area, one which is traditionally open to speech, it is the State's burden to explain why a larger area where political speech is forbidden is appropriately tailored to achieve the compelling interest of preventing election fraud and voter intimidation. We already held that a zone with a 500-foot radius, which covers 25 times the surface area of a zone with a 100-foot radius, is too large.

What remained is the question as to whether 300 feet is too much as well, and whether private property is exempted from the law. The Court agreed that some minimal obstacles to political speech, including providing identification, is permitted.[134] In this case, however, Kentucky presented no evidence as to why such a large radius was necessary and as such, the Court held that the statue "violates the Free Speech Clause of the First Amendment." The Court agreed the size of the prohibited geographical area was overbroad, in that it is simply too large, and because it does not exempt private property from the restrictions.

The decision of the district court is upheld.

EMPLOYMENT

Bennett v. Louisville Metro Government, 2015 WL 3893259 (6th Cir. 2015)

FACTS: In November, 2011, Bennett a Louisville Metro social worker employed by Corrections, complained about the conduct of a corrections officer, Waldridge. Despite intervention, the friction continued. Bennett told her supervisors she felt that Waldridge would not protect her from inmates, if necessary, and she filed a formal complaint. Director Bolton, according to Bennett, did not listen to her concerns but only said he would transfer her. Bolton asserted that he "was attempting to triage a possibly dangerous workplace situation" and opened an investigation, while still placing her temporarily in a safer assignment. She was moved from the main jail to a nearby community correctional center. Bennett's duties, however, changed considerably, she was removed from treatment programs she'd been working with and did not have office space at the new location. She was given the ability to pursue other programming relevant to the assignment, however. Nothing in the record indicated what the result of the investigation was, however.

Bennett filed suit, the District Court gave summary judgement to Metro Louisville. Bennett appealed.

ISSUE: May an employee be transferred temporarily while a workplace issue is investigated?

HOLDING: Yes

DISCUSSION: Bennett argued first that her transfer was "materially adverse" to her and as such, was prohibited retaliation for filing a complaint. A reasonable employee might well "think twice about reporting suspected discrimination if she knew that doing so would cause her employer to transfer her offsite and keep her treading water on nonsubstantive projects for five months." However, Louisville put forth a legitimate reason for the transfer, Bennett's safety, which was a "legitimate non-discriminatory reason." The Court found no reason to rule that was a smokescreen or pretext. The Court found that removing her from the facility was a reasonable response to concerns for her safety. Further, despite her assertion that the investigation was shoddy, the court was presented with no evidence in the record.

The Court affirmed the decision.

Green v. Township of Addison, 2015 WL 3388700 (6th Cir. 2015)

FACTS: In 1999, Green became the fire department clerk. Over 10 years, she was the sole clerical employee and received overall positive reviews, accompanied by promotions. In 2010, to address budget issues, the Chief resolved to eliminate her position and create a hybrid

[134] Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (plurality opinion).

firefighter/EMT/office manager position, which the holder of the position being able to also respond to daytime calls. Green, then 55, was offered the chance to take the necessary coursework, which the township paying, but she would first have to pass an agility test. Given less than a two-week notice, she failed the first test and was terminated three days later. The chief posted the position and hired a 29 year old female, who was already a part-time firefighter/EMT, but she was not required to take the agility test.

Green filed suit, claiming age discrimination. The District Court ruled in favor of the township and Green appealed.

ISSUE: May an employee's position be changed (requiring them to meet different requirements) with a legitimate reason?

HOLDING: Yes

DISCUSSION: To succeed, Green needed to identify a genuine issue of material fact "regarding the legitimacy of the township's stated justification." Their justification – economic necessity – was, she argued non-existent, as they were operating with a budget surplus and had made several large equipment purchases. In fact, the Court noted, "the record exhaustively detail[ed] the township's deteriorating finances." The Court agreed that the Chief's decision was well founded. The Chief's action in requiring her to take the agility test was appropriate, given that she'd not yet undergone any firefighter training – while the new employee was in fact already a certified firefighter.

The Court affirmed the decision.

Roth v. West Salem Police Dept., 2015 WL 3824962 (6th Cir. 2015)

FACTS: Roth worked as a part time police officer, and was also a member of the Marine Reserves. (He worked full time at a civilian position as well.) During the time in question, he was passed over for a promotion to sergeant during a deployment. When he returned, he was "suspended pending completion of anger management classes and passage of a psychological evaluation." When he did not pass the latter, he was terminated. Testimony indicated that members of the agency were aware that Roth was dissatisfied and believed his superiors were incompetent and putting officers at risk. During a second deployment, he discovered the promotion and expressed his upset about this to a fellow officer. However, he took training related to his police duties. When he returned, he expressed his concern that the promotion occurred without any form of testing or board. (Allegedly the captain made a comment to the effect that combat veterans should not be promoted.) After that, he was suspended. The process to complete what the agency required was "beset by delays." He was not approved for a return to active duty. A few months later, after not responding to letters asking about his desire to return, Roth was considered to have resigned.

Roth sued under the Uniformed Services Employment and Reemployment Rights Act (USERRA) and Ohio law. The Court gave summary judgement to West Salem, finding that the department's actions were justified by "valid, non-discriminatory reasons."

The trial court ruled in favor of the department and he appealed.

ISSUE: Are all actions taken against a servicemember actionable under USERRA?

HOLDING: No

DISCUSSION: The Court noted that even if Roth could prove that the adverse action (the failure to promote) was "motivated by animus against the employee's protected status, the employer may still prevail by proving that it would have taken the adverse action even absent that illicit motivation."[135] The

[135] Hance v. Norfolk S. Ry. Co., 571 F.3d 511 (6th Cir. 2009).

Court agreed that he could not show he would have been promoted even absent his military service – with the Chief identifying factors such as the other officer's "ability to work long hours, ability to follow orders and work smoothly with superiors, and absence of citizen complaints." (All of which were issues with Roth.) The Court agreed it was reasonable for small departments to make personnel decisions informally. Further, his suspension would have occurred even absent his military status.

However, the Court noted, if the suspension was based on "antimilitary bias," and if he was "intentionally impeded" – by delays – in "meeting the conditions for reinstatement," Rather might have been "de facto terminated in violation of USERRA." The Court noted, though, that there was strong evidence that the department "relied on valid reasons unrelated" to military status in the suspension. He had been reprimanded for various actions over the years and employees had expressed concern about his comments about killing people and the like. The Court agreed that the suspension and the concerns were valid, as a result of his psychological state, and that he was diagnosed with PTSD.

The Court agreed that in September, 2009, when he was suspended, "with barely-diagnosed PTSD and just a few months removed from his last deployment to Iraq, Roth was not able to effectively and safety perform the duties of a police officer." The Court affirmed the grant of summary judgement.

Festerman v. County of Wayne, 611 Fed.Appx. 310 (6th Cir. 2015)

FACTS: From 2007 to 2012, Festerman worked as an officer at one of the Wayne County (MI) jails, run by the Wayne County SO. Due to staffing issues, involuntary overtime was commonplace and required, and refusal to do it was grounds for discipline. On March 3, 2012, Festerman experienced a medical incident. When he returned to work on March 9, it was with a note that he was limited to 8 hours a day. For a few weeks, the limitation was accommodated, but on March 28, the Sheriff "made the determination that officers with doctor's notes that limited their working hours would be assigned overtime shifts, just as any other officer on duty, and would be issued [potential discipline] if they refused to work a mandatory overtime shift." Over the next week, Festerman refused two overtime shifts. After a hearing with HR, he was told to "complete a leave of absence form in order to be approved for intermittent leave under the FMLA." He was told that the doctor's note was enough to satisfy the notice requirement of his medical needs. He returned the paperwork as required. However, as the matter moved forward, he resigned. During the process, the job description for the position he held was changed to include mandatory OT as an essential function. Festerman later alleged that during the time period in question he'd suffered several "discriminatory incidents" with co-workers concerning his medical needs, and he and coworkers with similar restrictions had brought it to the attention of the SO. He submitted a formal complaint about it on the same day he resigned. He subsequently filed suit, arguing his rights under the Family Medical Leave Act (FMLA) had been violated. The Court ruled in favor of Wayne County and Festerman appealed.

ISSUE: Is retaliation for use of FMLA leave actionable?

HOLDING: Yes

DISCUSSION: The Court looked to the requirements of the FMLA, and theories under which lawsuits may be brought – the 'entitlement' or 'interference' theory arising from 29 U.S.C. § 2615(a)(1); and (2) the 'retaliation' or 'discrimination' theory arising from 29 U.S.C. § 2615(a)(2)."[136]

> Unlawful Interference occurs when an employer refuses to authorize leave for a qualified employee, when an employer considers the taking of FMLA leave as a negative factor in an employment action, and when an employer counts FMLA leave under a no-fault attendance policy.[137] To succeed on a claim for FMLA interference, an employee must show:
> (1) [the employee] was an eligible employee show:

[136] Hoge v. Honda of Am. Mfg., Inc., 384 F.3d 238 (6th Cir. 2004).
[137] George, 106 F. App'x at 950 (citing 29 C.F.R. § 825.220).

(1) [the employee] was an eligible employee; (2) the defendant was an employer as defined under the FMLA; (3) the employee was entitled to leave under the FMLA; (4) the employee gave the employer notice of her intention to take leave; and (5) the employer denied the employee FMLA benefits to which she was entitled." The trial court agreed he's shown the first three, but not the last, and that he did not provide sufficient notice of his needs. It was undisputed that he did not receive a requirement to work OT or a threat of discipline following his meeting with HR about his needs. The question was whether the note was enough, which was provided upon his return, and the court continued:

In contrast to simply "calling in sick," a doctor's note conveyed to an employer can satisfy the notice requirements under the FMLA in certain circumstances.[138] For example, a doctor's note that details the qualifying medical condition that caused an employee's absence is generally sufficient notice. Id. A doctor's note that fails to state with specificity the condition behind the prescribed leave or the treatment to be administered, however, is insufficient on its own to provide notice to an employer of the employee's request for FMLA leave.[139] Whether a doctor's note amounts to sufficient notice depends on whether, in context, it provides "enough information for the employer to reasonably conclude" that the employee's prescribed leave is due to a FMLA-qualifying condition.[140]

In the present case, this Court is confronted with a doctor's note that expressly discloses a requirement of limiting the employee's work hours per day, but fails to disclose the condition that gives rise to this requirement or any additional prescribed treatment. Consequently, the doctor's note submitted by Festerman, in isolation, may not have provided sufficient notice to Wayne County of a qualifying condition under the FMLA. The circumstances surrounding Festerman's initial qualifying leave, however, provided additional context to the doctor's note and are evidence that Festerman's superiors were aware of his potential FMLA-qualifying condition.

Further, it had been the practice of the county to "grant leave based solely on the submittal of a doctor's note" and in fact, for several weeks, he was given an accommodation. "The record also includes evidence that March 29, 2012 was the first time Wayne County communicated the requirement of a written request for leave to Festerman. It is difficult to comprehend how Festerman could comply with Wayne County's "usual" notice policy on March 12, 2012 if the policy did not exist at that time or was never communicated to Festerman." The Court agreed there was a genuine issue of fact as to whether he met the requirement on the date he returned to work. The court looked whether he could be considered to be constructively discharged when he was "granted preliminary intermittent leave and was not required to work any overtime leading up to his quitting the job." The Court agreed it was "inconsistent with the purpose of the Act to bar an employee who was forced to quit his position from seeking an interference claim on grounds that the employee's forced resignation obviated any need by the employer to provide the employee benefits to which he would otherwise be entitled. Because Festerman has provided sufficient evidence of the elements for a constructive discharge, see infra Part III.B, Festerman has also provided sufficient evidence to establish a genuine issue of material fact as to whether he was denied a benefit under the FMLA."

Further he alleged retaliation. The Court looked to the elements of such claims: an employee must show: "(1) [the employee] was engaged in an activity protected by the FMLA; (2) the employer knew that she was exercising her rights under the FMLA; (3) after learning of the employee's exercise of FMLA rights, the employer took an employment action adverse to her; and (4) there was a causal connection between the protected FMLA activity and the adverse employment action."[141]

[138] See Brenneman, 366 F.3d 412 (6th Cir. 2004)..
[139] See Woods v. Daimler Chrysler Corp. , 409 F.3d 984 (8th Cir. 2005).
[140] See Wallace v. Fedex Corp, 764 F.3d 571 (6th Cir. 2014); Thorson v. Gemini, Inc., 205 F.3d 370 (8th Cir. 2000) (finding sufficient notice under the FMLA when an employee "was absent for more than three days with notes from her physician, written on two different occasions within that period of absence, indicating that she was not to work").
[141] Donald v. Sybra, 667 F.3d 757 (6th Cir. 2012).

> Under the McDonnel Douglas framework, when "a plaintiff makes a prima facie showing of retaliation, the burden shifts to the defendant to establish "a legitimate, nondiscriminatory reason for its decision . . . ."[142] The burden imposed on a plaintiff to establish a prima facie case for retaliation "is not intended to be an onerous one."[143] If the defendant satisfies its burden in establishing a legitimate, nondiscriminatory reason for its decision, the plaintiff's retaliation claim will overcome a summary judgment challenge only if the plaintiff can show that the there is a genuine issue of material fact as to whether defendant's "stated reasons are a pretext for unlawful discrimination."
>
> There is no dispute that Festerman satisfied the first element of the retaliation analysis. The district court's grant of summary judgment was limited to elements 2, 3, and 4. Regarding the second element, as discussed above, Festerman proffered evidence that he provided notice to Wayne County on March 12, 2012 of his request for FMLA leave sufficient to avoid summary judgment. Consequently, this Court's analysis focuses on the last two elements of the prima facie case and whether Festerman has made a successful showing under the McDonnell Douglas framework.

Festerman argues that he was constructively discharged from his position for seeking FMLA leave. To establish prima facie constructive discharge, "a plaintiff must adduce evidence to show that (1) the employer deliberately created intolerable working conditions, as perceived by a reasonable person, (2) the employer did so with the intention of forcing the employee to quit, and (3) the employee actually quit."[144] Constructive discharge analysis necessarily includes an examination of both the employer's intent and the objective feelings of the employee. Id. In the instant case, it is undisputed that Festerman quit his job with Wayne County.

> Regarding the first element of constructive discharge, working conditions are objectively intolerable where "a reasonable person in the plaintiff's shoes would feel compelled to resign."[145] Hurt feelings and public criticism alone are insufficient to establish the existence of intolerable working conditions.[146]
>
> This Circuit considers several factors in determining whether a reasonable person would feel compelled to resign a position, including: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a [male] supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.[147] This list of factors is not exclusive, and the presiding court is free to consider other relevant factors as it sees fit.
>
> Festerman asserts that he was subjected to intolerable working conditions based in part on harassment from Wayne County's supervisory staff. In particular, Festerman alleges that Wayne County implicitly authorized the harassment of Festerman "by a coworker who wore a t-shirt mocking his medical condition," which read, "I refuse – I have a note from my mom." The district court discounted the significance of the t-shirt worn by Officer Darryl Thornton, concluding that "[a] reasonable officer, especially one accustomed to providing security for inmates at a state jail facility, would not feel compelled to resign based on a t-shirt poking fun at employees who refused mandatory overtime." Here, however, Festerman not only provided evidence of his own outrage at Wayne County's handling of the matter, but also tendered evidence that several of his colleagues were offended by the incident.

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[142] McDonnell Douglas Corp. v. Green, 411 U.S. 782 (1973).
[143] Bryson v. Regis Corp., 498 F.3d 561 (6th Cir. 2007) (internal quotation marks and citations omitted); Dixon v. Gonzales, 481 F.3d 324 (6th Cir. 2007) ("The burden of proof at the prima facie stage is minimal . . . .").
[144] Savage v. Gee, 665 F.3d 732 (6th Cir. 2012)
[145] Scott v. Goodyear Tire & Rubber Co., 160 F.3d 1121, 1127 (6th Cir. 1998) (internal quotation marks and citations omitted).
[146] Savage, 665 F.3d at 739 (citing Peters v. Lincoln Elec. Co., 285 F.3d 456 (6th Cir. 2002)).
[147] Saroli v. Automation & Modular Components, Inc., 405 F.3d 446, 451 (6th Cir. 2005).

Moreover, Festerman's evidence showed that Sergeant Tripp's investigation into the t-shirt incident only added insult to injury. Instead of investigating whether Thornton violated jail policies by, for example, wearing the shirt while on duty, Tripp focused her efforts on the motives of those who complained. During her interview with Festerman, Tripp repeatedly asked why Festerman refused to work overtime even though she knew Festerman's leave requests were medically related. Tripp also inquired as to who told Festerman about the shirt and whether Festerman had mentioned any other names in his complaint. Tripp instructed Festerman not to discuss the investigation with anyone, but then dropped the investigation soon thereafter without making official recommendations or findings. Finally, Festerman later learned that Tripp had accused the officer who told Festerman about the shirt—rather than the officer who wore the shirt—of creating the problem. (Id.) Festerman submitted evidence that another supervisor had also referred to Festerman and the others who complained as "trouble makers." Although "hurt feelings" are not enough to show a constructive discharge, a reasonable jury could find that the combined hostility from the officers and supervisors to Festerman resulting from his leave requests and complaints of harassment contributed to objectively intolerable working conditions.

The district court also incorrectly discounted Festerman's assertion that the CIRs issued to him on April 6, 2012 and April 8, 2012 contributed to an intolerable work environment on the basis that Wayne County had not received notice at the time the CIRs were issued that Festerman sought leave under the FMLA. The district court concluded that without notice, no causal connection between Festerman's FMLA leave request and the issuance of CIRs could be established. In addition to the argument that issuance of the CIRs created intolerable working conditions, Festerman argues that Wayne County's failure to cancel those CIRs and the related administrative review hearing after Festerman provided subsequent notice of his intent to seek FMLA leave during his April 9, 2012 discussion with Human Resources, and his submission of the relevant documentation on May 3, 2012 contributed significantly to the negative working conditions.

Finally, the Court noted and most significant, effect that the modification of the job requirements for Festerman's position had on his working conditions. Festerman provided evidence that after he requested intermittent FMLA leave, Wayne County increased the required workweek hours from 40 hours per week to 40.5 hours per week. Further, Wayne County required mandatory overtime as part of the essential job functions. These modifications to Festerman's job description meant that Festerman could no longer fulfill the requirements of the position without contravening his doctor's advice. Moreover, Wayne County's adjustment of Festerman's job description occurred just one day after Commander Scott Gatti was notified that Festerman and three other officers had been granted informal accommodations based on doctors' notes. The modifications appeared to closely track the time limitations placed on Festerman by his doctor and the intermittent leave Festerman sought under the FMLA. Consequently, a reasonable jury could find that Festerman was targeted in such a way as to compel him to resign his position. Furthermore, because the changes were made in close proximity to the occasions when Festerman submitted notice of his FMLA qualifying condition, a reasonable jury could find that a causal connection existed between Festerman's leave request and the changes to his job description.[148]

The Court reversed and remanded the decision of the trial court.

WIRETAPS

U.S. v. Wright, 2015 WL 3388778 (6th Cir. 2015)

FACTS: At various times, in support of a drug trafficking investigation in Akron (OH), six Title III wiretap orders were sought by federal authorities. In each, Agent Porrini (FBI) "provided an affidavit stating that there was probable cause to believe the interceptions would reveal evidence of drug

[148] See Bryson, 498 F.3d at 571 ("We have previously held that proximity in time between the protected activity and the adverse employment action may constitute evidence of a causal connection.").

trafficking and that the interceptions were necessary to achieve the objectives of the investigation. The issuing district judge approved each application." Using traditional investigative methods, the investigators had discovered a myriad of facts about the operation and had tied Wright to the conspiracy. All of the defendants (including Wright) sought to have the wiretap information excluded, and were denied. They took conditional guilty pleas and appealed.

ISSUE: Is an applicant for a wiretap required to prove that other methods wouldn't work?

HOLDING: No

DISCUSSON: The Court looked to the legal requirement for a wiretap, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§2510- 2522. An application for a wiretap must include "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. §2518(1)(c). This "necessity" requirement is designed "to assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime" and to prevent wiretapping from being "routinely employed as the initial step in criminal investigation."[149] All that is required, however, is that serious consideration be given to other methods before a wiretap is used, and does not require that the information would be impossible to find otherwise.

The Court noted that "SA Porrini described specifically and factually the following investigative techniques: (1) surveillance, which included physically observing the investigation's targets, videotaping them with pole cameras, tracking them through cell phone GPS or "cell site" data, and attaching tracking devices to their vehicles; (2) the use of confidential sources; (3) the use of grand jury subpoenas; (4) the use of interviews, which sought to compel cooperation by revealing to the targets evidence gathered against them; (5) the collection of telephone subscriber information through toll record and pen register analysis; (6) the use of trash searches; and (7) the execution of search warrants on suspected "stash houses." SA Porrini concluded that each of these traditional investigative techniques was inadequate to uncover the full extent of illegal activity, necessitating the use of a wiretap." The Court agreed his affidavits were more than adequate to support the warrants and that although he used some boilerplate, it was simply "statements that would be equally application to almost any … case [of this kind]." Further, allegedly false statements were not shown to actually be false. Nor did he provide enough information to justify the need for a Franks hearing, either.

The Court also looked to information from CIs, and noted that "these confidential sources provided reliable information." The agent had corroborated much of the information provided by the Cis and as such, the court agreed the information was properly used. Another defendant argued that the "necessity of a wiretap within the context of the investigation as a whole, not in relation to individual targets or interceptees." As such, the fact that the defendant was not initially the target of the wiretap but only caught up as a result of the capture of the phone calls was immaterial.

The Court upheld the convictions.

CHILD PORNOGRAPHY

U.S. v. Abbring, 788 F.3d 565 (6th Cir. 2015)

FACTS: Over six years, Abbring downloaded a vast number of videos and images depicting child pornography. He was charged in July, 2012, when a federal agent using the peer-to-peer file-sharing program noted files available from Abbring's IP address. He pled guilty to receiving child pornography, which a sentence enhancement for distributing as well. He argued that the distribution occurred by the nature of the program itself, not by anything he deliberately intended. He was convicted and appealed.

ISSUE: Is the use of a file sharing program proof of distribution?

[149] U.S. v. Landmesser, 553 F.2d 17 (6th Cir. 1977).

HOLDING: Yes

DISCUSSION: The Court noted that the "whole point of a file-sharing program is to share, sharing creates a transfer, and transferring equals distribution."[150] In effect, under the program, he was sharing illegal images while he was downloading them himself – the way the program was designed to do. Although he tried to stop it, he was not a novice and was experienced in using the program. The statute doesn't require intentional distribution, only knowing distribution.

The Court affirmed his conviction.

CIVIL LITIGATION

Crabbs v. Scott, 786 F.3d 426 (6th Cir. 2015)

FACTS: Crabbs sued the Franklin County, Ohio, Sheriff for requiring him to submit to a DNA cheeks (buccal) swab after he was acquitted of voluntary manslaughter. The Sheriff argued for immunity, as state law required him to collect the swab. (In fact, because Crabbs' situation straddled the relevant date, which his original arrest occurring before it was required, and a subsequent arrest, for violating his bond, occurred after that date, there was confusion as to whether it was required or not.) He was subsequent acquitted but was held until he complied with the cheek swab requirement.

The Sheriff was denied immunity and he filed an interlocutory appeal.

ISSUE: Is a sheriff's action always immune?

HOLDING: No

DISCUSSION: The Court noted that in Ohio, "damages actions against state officers in their official capacities count as lawsuits against the State."[151] However, in Ohio, counties and their officers do not share State immunity.[152] The Court agreed that in some situation, "law enforcement officers … wear multiple hats, acting on behalf of the county *and* the State." [153] "Immunity hinges on whether the officer represents the State in the "particular area" or on the "particular issue" in question." And that depends upon state and local law, including who entity is responsible for paying the judgement, how the statutes and courts refer to the officer, who appoints, who pays and how much state control is exercised over the officers and finally, whether the functions exercised are a state or local function.[154]

The Court concluded, using those factors, that Sheriff Scott was acting as a county official in this instance. Since state law, in fact, did not require the collection at that point, his bond violation not counting as a new crime, the new statute didn't require the collection.

The Court affirmed the denial of summary judgement.

[150] U.S. v. Conner, 521 F. App'x 493 (6th Cir. 2013).
[151] Kentucky v. Graham, 473 U.S. 159 (1985).
[152] Mt. Healthy City Sch. Dist. Bd. Of Educ v. Doyle, 429 U.S. 274 (1977).
[153] McMillan v. Monroe Cnty., 520 U.S. 781 (1997).
[154] Ermst v. Rosomg, 427 F.3d 351 (6th Cir. 2005); Hess v. Port Auth. Trans-Hudson Corp. , 513 U.S. 30 (1994).